

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

Brenneman and Pagenstecher, Inc.

Petitioner

Dean Brenneman

Stephen G. Petersen

William Landfair

Chris Cowles

For the Petition

Jody Kline, Esquire

Attorney for Petitioner

Martin Klauber, Esquire, People's Counsel

In Support of the Petition

Michelle Oaks, Historic Preservation Office

Dan Janousek, M-NCPPC Technical Staff

David Niblock, Department of Permitting Services

Dan Hardy, M-NCPPC Transportation Planning

Government Officials Recommending Approval

Mohican Hills Citizens Association

By Arrigo Mongini, President

Mohican Swimming Pool Association

By Sylvia Reis, President

David Haas, Margaret Hazen, Harry Schwartz,

Philip Thorson, Adrienne Lewis, Lori Veirs,

Marion Ellis, Alexander Djordjevich, Robert Hazen,

Joe Saliunas, Candace Charlton, Wayne Goldstein,

and Leslie Miles

Community Participants in Support

Norma Spiegel

Ronald Nessen

John Juenemann

Norman Knopf, Esquire

Attorney for the Opposition

Glen Echo Heights Citizens Association

By John Fenton and Peter Winch, its

President and Second Vice-President

Community Participants in Opposition

Before: Martin L. Grossman, Hearing Examiner

Board of Appeals Case No. S-2651
(OZAH Case No. 06-2)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF THE CASE	3
II. BACKGROUND AND LEGAL ISSUES.....	6
A. The Subject Property and Surrounding Neighborhood.....	6
B. The Master Plan	15
C. Proposed Use.....	18
1. Exterior Renovations:	19
2. Interior Renovations and Planned Use:.....	21
3. The On-Site Parking Facility:	22
4. The Parking Regulation Waivers:.....	28
5. Landscaping, Lighting and Signage:.....	31
6. Public Facilities:.....	34
7. Environment:.....	39
8. The Nature of the Work, Staffing and Hours of Operation:	41
D. Community Response	45
E. Legal Issues	48
1. MacArthur Boulevard and the “Highway Requirement”:	48
2. Zoning, Historic Preservation, Development Standards and Renovations:.....	52
3. The Meaning of Professional Office under Zoning Ordinance §§59-A-2.1 and 59-G-2.38:	65
III. SUMMARY OF THE HEARING	70
A. Petitioner’s Case	72
B. Government Witnesses.....	104
C. Community Witnesses in Support.....	116
D. Community Witnesses in Opposition	132
E. People’s Counsel	145
IV. FINDINGS AND CONCLUSIONS	147
A. Standard for Evaluation	147
B. General Conditions.....	149
C. Specific Standards.....	154
D. Additional Applicable Standards	157
V. RECOMMENDATION	161

I. STATEMENT OF THE CASE

This is an unusual special exception case because it requires the harmonizing of two statutory schemes, the Zoning Ordinance and the Historic Resources Preservation Ordinance. It also depends on the resolution of numerous legal issues, which will be discussed in Part II. E of this report. Many of these issues result from two factors – the property, though located in a residential area, had been used for many years as a combined commercial/residential use, and it does not comport with setbacks specified in the Zoning Ordinance because it was constructed prior to the enactment of any zoning ordinance. Not surprisingly, this case has engendered significant community and governmental interest, and five days of hearings were needed to receive all the testimony.¹

The Petition, Board of Appeals No. S-2651, was filed on June 6, 2005, seeking a special exception, pursuant to §59-G-2.38 of the Zoning Ordinance, to permit a professional (*i.e.*, architect's) office for use by non-resident practitioners at 7025 MacArthur Boulevard and Walhonding Road, in the Palisades area of Bethesda. The petition also seeks the waiver of a number of parking regulations pursuant to Zoning Ordinance §59-E-4.5.

The subject property is approximately 6,873 square feet in area and is more particularly known as the Sycamore Store, located on Lot 32, Block 2 of the Glen Echo Heights Subdivision. It is zoned R-90 and has been designated as an historic landmark (Council Resolution No. 15-1247, adopted 12/6/2005). The Petitioner proposes to preserve the historic look of the building by renovating the premises, without expanding the structure, and to operate an “architect-build” firm as an adaptive reuse of this historic building.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated October 20, 2005, recommended approval of the petition, with

¹ Transcripts are identified by date. For example, testimony at page 27 of the May 12, 2006 hearing will be identified as “5/12/06 Tr. 27.”

conditions (Exhibit 23).² By letter dated October 28, 2005, the Planning Board for Montgomery County indicated its unanimous recommendation of approval, with an amplified version of the conditions recommend by Technical Staff (Exhibit 37). The Montgomery County Historic Preservation Commission also unanimously recommended approval of the Special Exception, in a letter dated November 1, 2005 (Exhibit 30).

Because many issues came to light after the initial reviews by the Department of Permitting Services (DPS), Technical Staff and the Planning Board, the Hearing Examiner requested that the parties brief these issues and that the governmental agencies re-examine their positions in light of these issues (Exhibit 53). On March 20, 2006, Technical Staff issued a supplemental report reaffirming their earlier recommendation (Exhibit 67). On April 6, 2006, the Planning Board unanimously renewed the same recommendation of approval, with conditions, it had made initially (Exhibit 71).

Duly noticed public hearings were held in this case on November 4, 2005, April 10, 2006, May 12, 2006, May 19, 2006 and November 17, 2006. The final day of hearing (November 17, 2006) had to be added because, on August 16, 2006, Petitioner revised its site and landscaping plans in an effort to make the parking arrangements more acceptable to the community (Exhibit 127). The revised plans moved most of the proposed parking facility to the rear of the Sycamore Store, significantly changing the views of the parked cars from the street. The Historic Preservation Commission reviewed the changed plans on October 11, 2006, and voted unanimously to continue its support of the special exception petition, as indicated in the letter of its Chairman dated October 24, 2006 (Exhibit 140). Transportation Planning Staff also reviewed these proposed changes and sent an e-mail with their recommendations for further improvements on November 8, 2006 (Exhibit 141).

There was no shortage of witnesses at the hearings in this case. The Petitioner called four witnesses, experts in land use, transportation planning and tree care, and one of its principals, Dean

² The Technical Staff reports are frequently quoted and paraphrased herein.

Brenneman, who is an architect; four government officials also testified, all supporting Petitioner's arguments; fifteen witnesses from the community testified in support of the petition, including the Mohican Swimming Pool Association and the Mohican Hills Citizens Association, representing properties mostly west of Walhonding Road; and five witnesses from the community testified against the petition, including three of whom were represented by counsel and two of whom testified on behalf of the Glen Echo Heights Citizens Association, representing properties mostly to the east of Walhonding Road. Martin Klauber, the People's Counsel, participated in the hearings and expressed his support for the petition.

The record was held open after the final hearing date to await an opinion from the County Attorney regarding two of the more significant legal issues in this case. That opinion was issued on February 12, 2007 (Exhibit 159), and at the request of the parties, the record remained open until March 16, 2007 to allow them to comment on the legal issues in light of the County Attorney's opinion. This deadline was further extended at the request of the parties until April 6, 2007. On that date, Petitioner filed a revised "Consolidated Statement of Operations" (Exhibit 166), and the Opposition filed a response to the County Attorney's legal memorandum. Exhibit 165. The record closed as scheduled on April 6, 2007, but it had to be reopened briefly, on May 2, 2007, to receive a corrected Site Plan eliminating a typographical error (Exhibit 167(a)). The record closed again on the same day.

The outcome of this case depends on the resolution of three controlling legal issues:

1. Does MacArthur Boulevard satisfy the "highway" requirement of Section 59-G-2.38(c)(2)?
2. Does the Zoning Ordinance, when read in conjunction with the Historic Resources Preservation Ordinance, permit the granting of a Special Exception, and allow the renovations and alterations planned on the subject site, absent a variance, even though the site does not, and will not, comply with the applicable zone's current development standards?
3. Does the proposed use (an "architect-build" firm) meet the definition of "members of a recognized profession" under Zoning Ordinance §§59-A-2.1 and 59-G-2.38?

Having considered each of these issues and all the evidence presented in this case, the Hearing Examiner concludes that the proposed special exception would meet all the special and general criteria spelled out in the Zoning Ordinance, if certain conditions are imposed by the Board. Therefore, the Hearing Examiner recommends that the special exception, as conditioned, be granted.

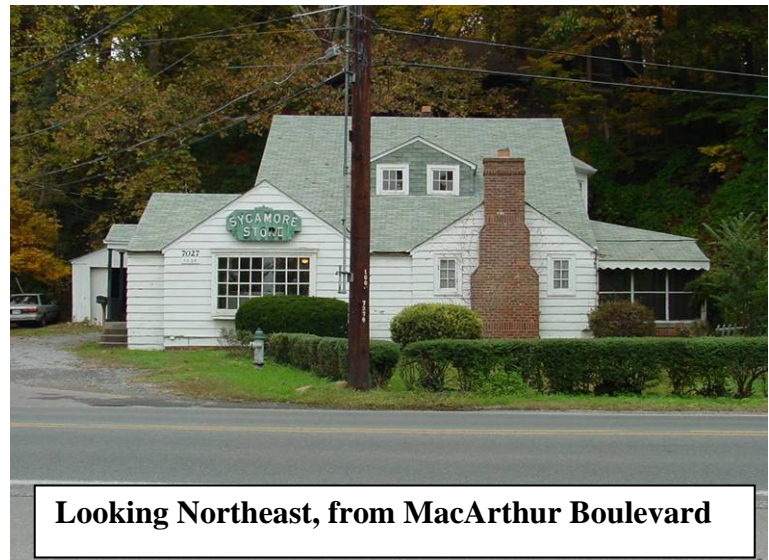
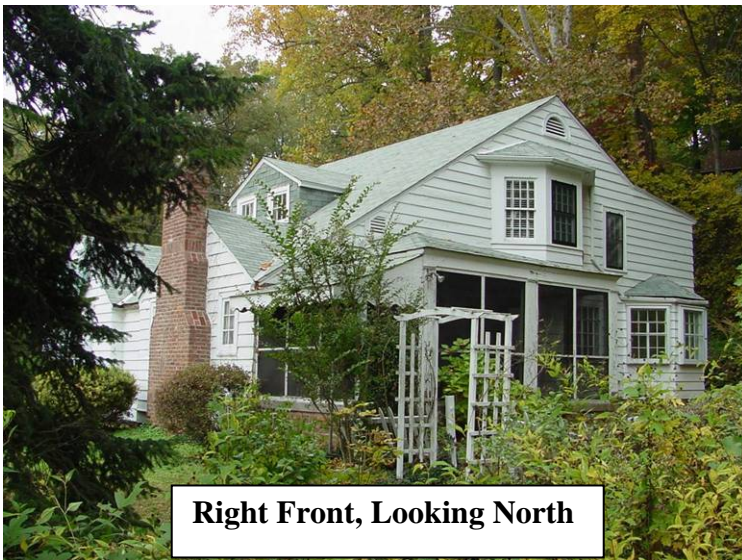
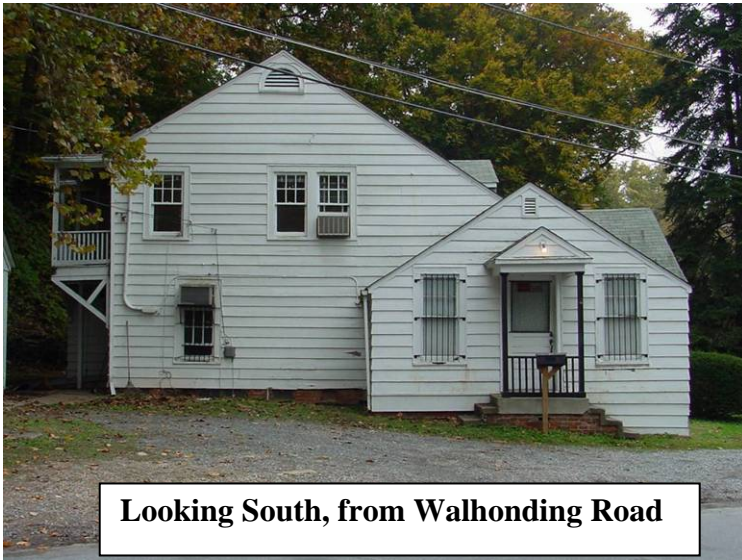
II. BACKGROUND AND LEGAL ISSUES

A. The Subject Property and Surrounding Neighborhood

The subject property is known as “the Sycamore Store.” It is on a lot of approximately 6,873 square feet in area, located at the southeast corner of MacArthur Boulevard and Walhonding Road. The following photographs from Petitioner’s PowerPoint presentation (Exhibit 98, Slides 37, 38, 39, 40 and 42) depict the Sycamore Store as it exists today:



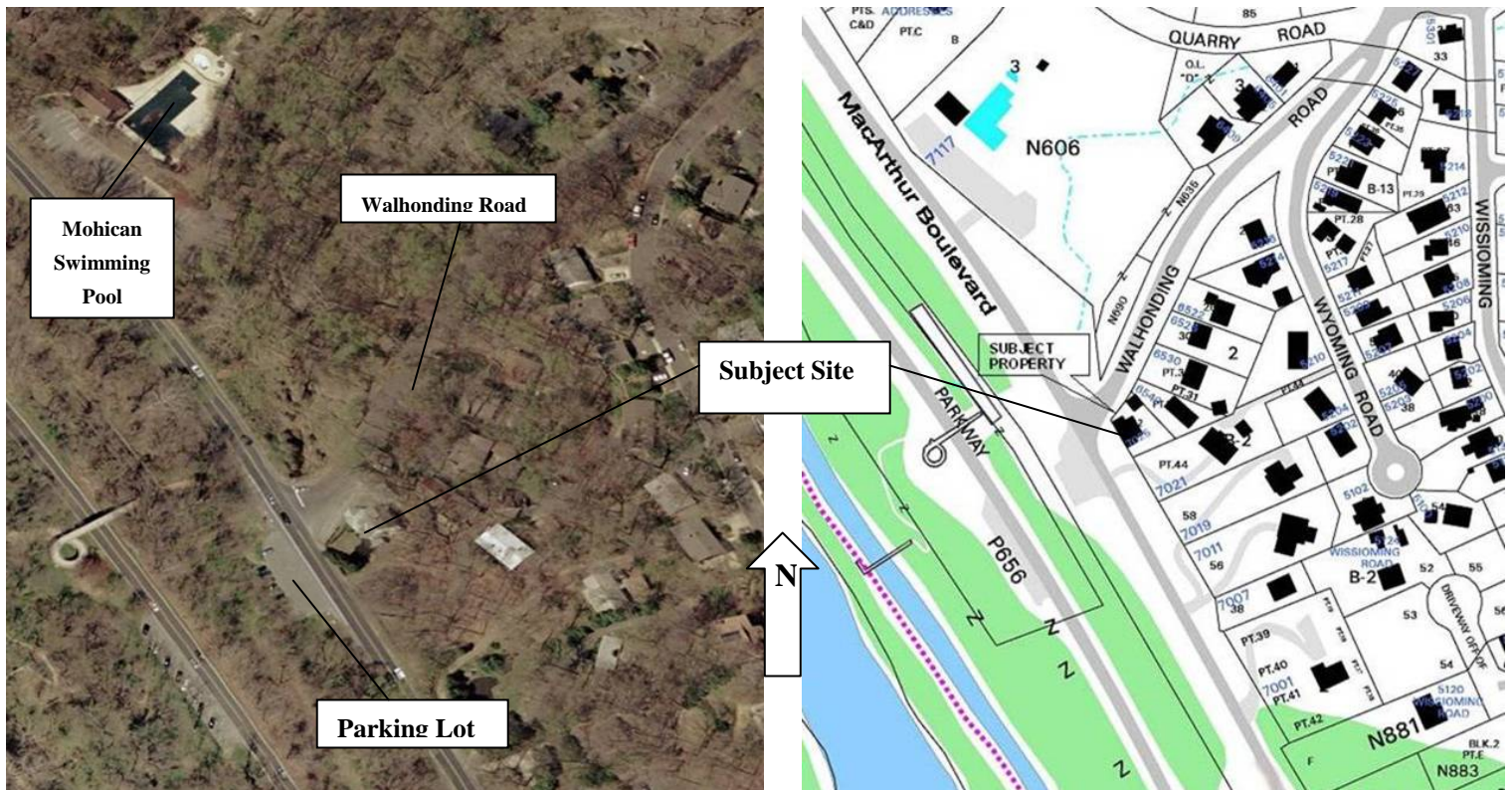
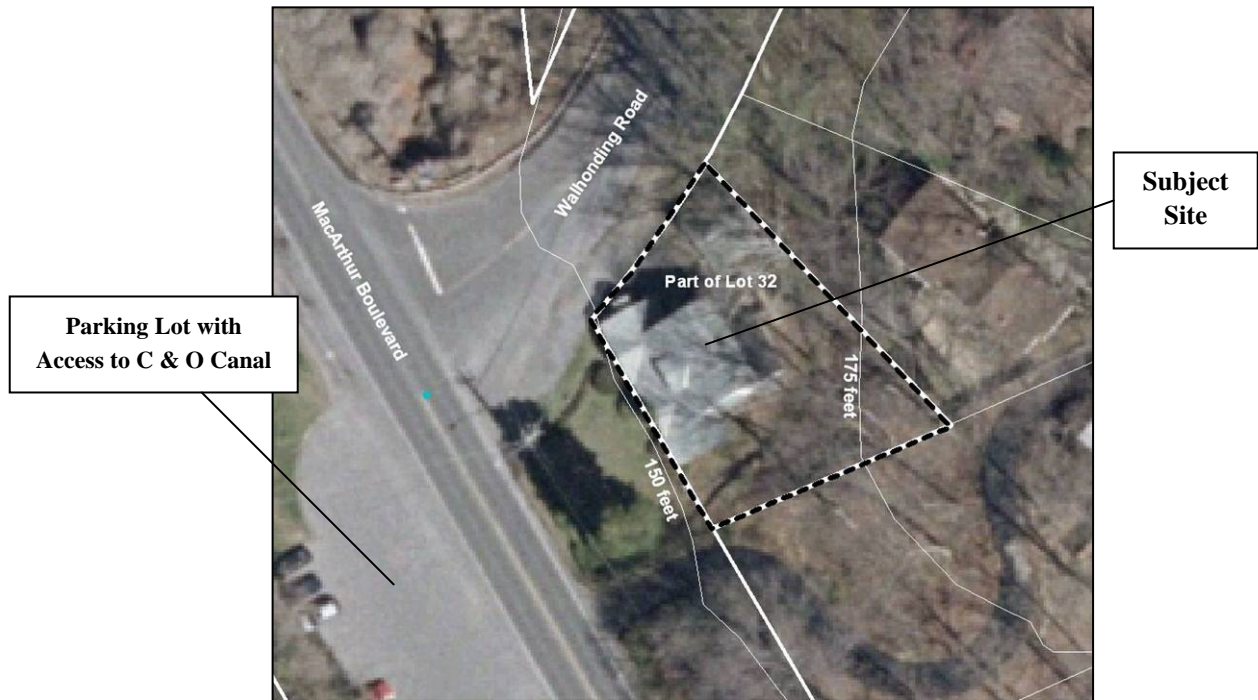
**Looking Southeast, from the Intersection of
MacArthur Boulevard and Walhonding Road**



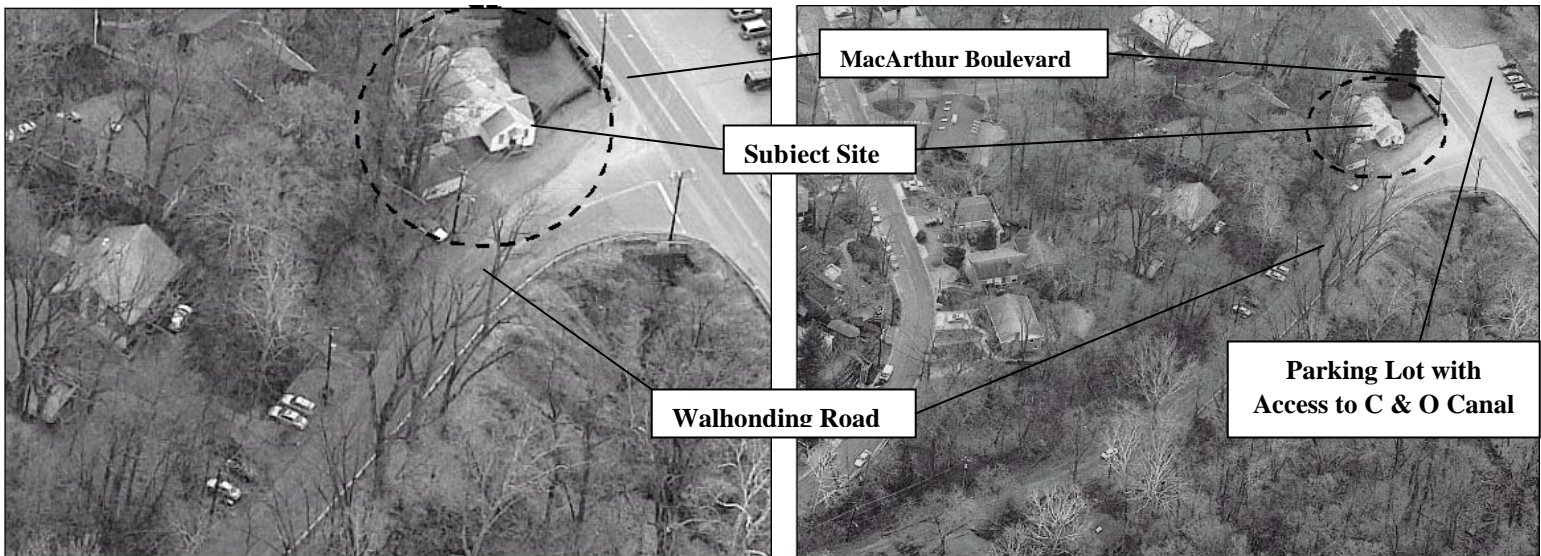
Slide 44 from Exhibit 98 depicts the Current Site Layout:



The site is also shown below in an aerial photo (Exhibit 23, p. 5), followed by an aerial photo of the surrounding area (Exhibit 98, Slide 43) and a Planimetric Map from the Technical Staff report:



The following aerial views from the Technical Staff report show the Sycamore Store in the context of its immediate neighbors:



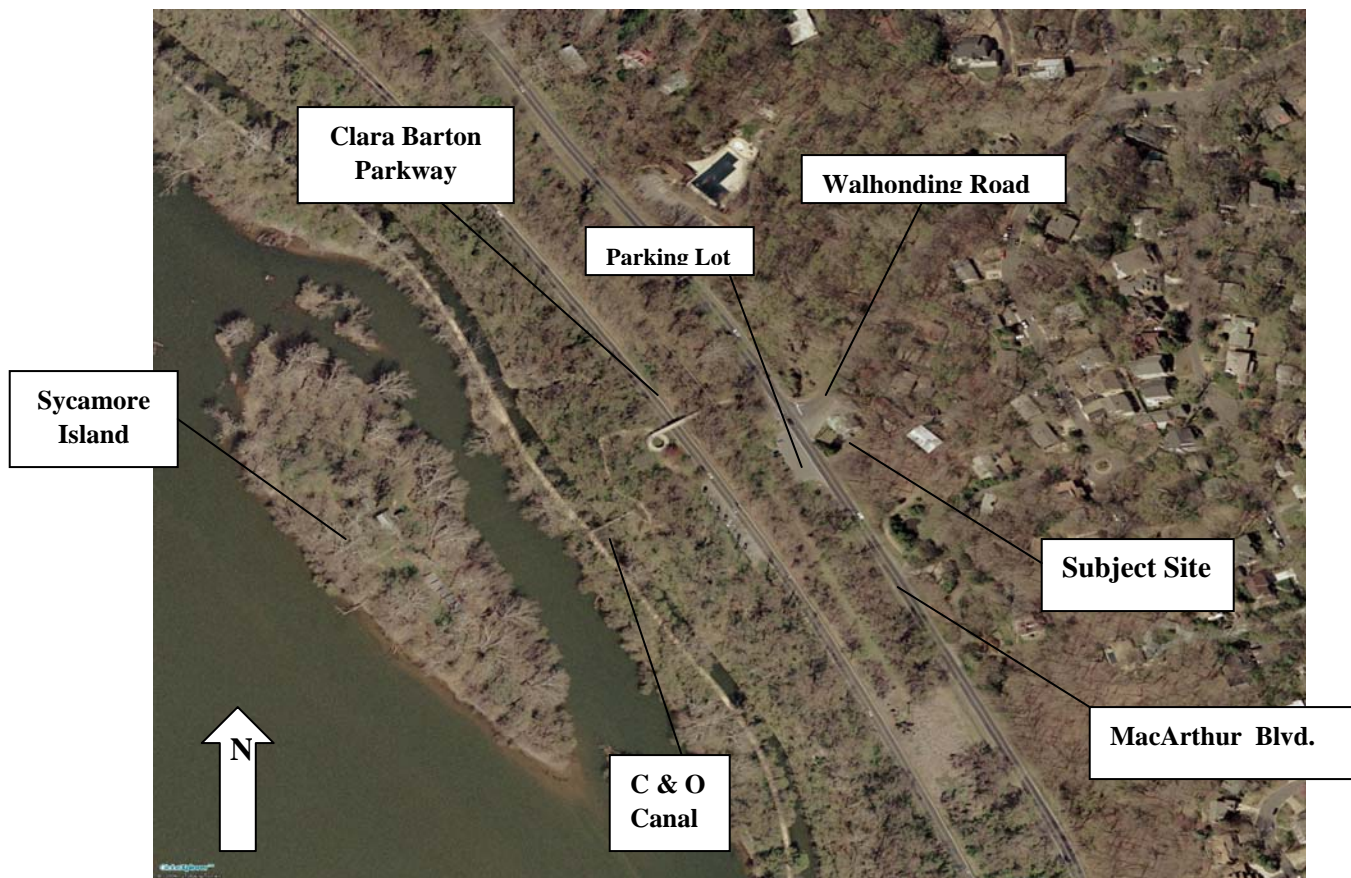
The subject site is in the Glen Echo Heights Subdivision, near the Potomac River and the Chesapeake and Ohio Canal National Park. It is part of the “Palisades Area,” shown on the Land Use Plan for the Bethesda-Chevy Chase Master Plan. Technical Staff briefly described the history of the Sycamore Store in its reports (Exhibits 23 and 67), and a more detailed description is contained in materials from the Maryland Historic Trust (Exhibit 90).

The lot was originally platted in 1889,³ as Lot 32, Section 2 of Glen Echo Heights; however, the current subject site was created as “Part of Lot 32” by deed recorded on November 5, 1953. (Exhibit 85). Physical evidence suggests that the original building was a one-and-a-half story bungalow of the type typically constructed for residential use. The building is similar to residential buildings in the Glen Echo area *circa* 1914-1918. The main structure is variously described as being constructed in 1916 or 1919 (*i.e.*, in either case, prior to the first Zoning Ordinance, which was enacted in 1928), and Technical Staff reports evidence that a store was operating on the property in 1919.

³ Technical Staff reports that the lot was originally platted in 1898, but the plat attached to Exhibit 85 is dated 1889.

The building housed a storekeeper and his family, and it was modified sometime in 1925 and again in the 1930's. According to Mr. Brenneman's testimony, it was the addition made in 1925 (prior to the first Zoning Ordinance) that brought the structure to within two feet of the property lines on both MacArthur (1.9 foot setback) and Walhonding (1.2 foot setback). 4/10/06 Tr. 254-256. These 1925 improvements are also responsible for the current front elevation of the structure and the historical configuration of the building, which occupies approximately 2,802 square feet. A small accessory garage is adjacent to Walhonding Road, on the northeast side of the property.

The Sycamore Store got its name from the nearby Sycamore Island, which is located in the Potomac River, opposite Walhonding Road (across the canal, the Clara Barton Parkway and MacArthur Boulevard), as shown below in an aerial photo (Exhibit 95):



The parking lot on the south side of MacArthur (labeled above), opposite the Sycamore Store, originally served the Sycamore Island Club, a private club located on Sycamore Island. It became a

parking lot that served not only the trail to the C & O Canal, but also the Sycamore Store while it operated. 4/10/06 Tr. 227-229. It is currently under County jurisdiction, but the County has elected not to regulate its use. *See* Exhibit 149 and testimony at 11/17/06 Tr. 34-35 and 59. The intersection at Walhonding Road was once called “Sycamore Junction,” and was the terminus for a trolley-car line that served Sycamore Island and, among other places, the fledgling Glen Echo Park.

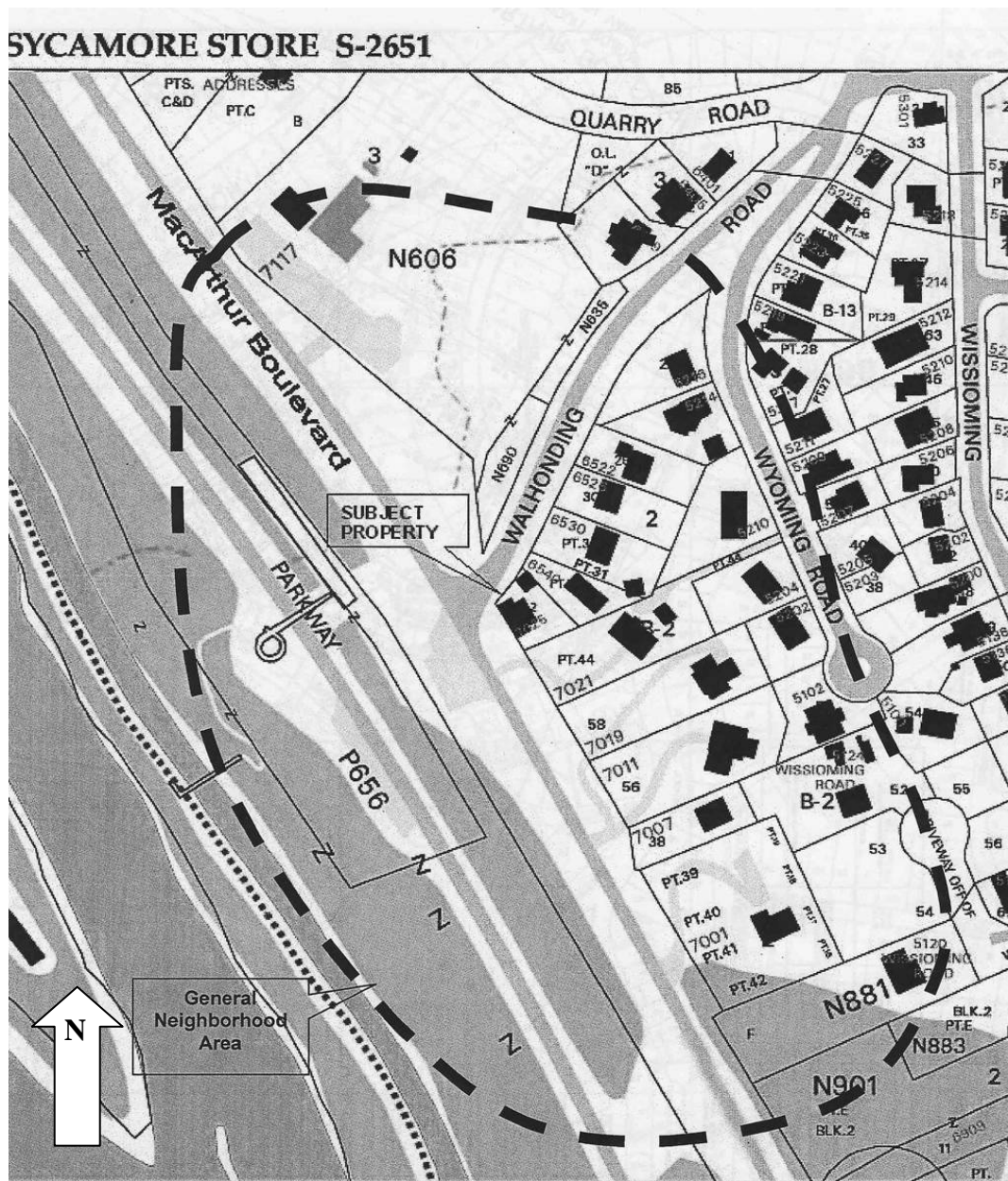
The Sycamore Store operated as both a residence and a small grocery and sandwich store until 1985, and then, as its owners got older, its commercial operations gradually diminished until 1995, when all commercial activity stopped. 5/12/06 Tr. 93-94. It continued as a residence until the storekeeper and his wife moved away in January 2004. Exhibit 23, p. 3. Messrs. Brenneman and Pagenstecher bought the property in 2004.

The Sycamore Store is located at the base of a large hill, and the adjacent properties are therefore found at significantly higher elevations. Mr. Brenneman described the main building itself as being “in very rough condition” (4/10/06 Tr. 235-236), with a functionally obsolete heating system and no air conditioning system. Plumbing and electrical are also functionally obsolete. The sewer line is clogged by roots and needs to be replaced, as well as its water service, which is undersized for anything other than the kitchen and one bathroom that are there now. It has a dirt cellar floor and a crawl space which has been excavated out, but not properly underpinned. So the foundation of the building is vulnerable and needs to be underpinned and shored up. This building sits immediately adjacent to the main aqueduct serving the Washington, D.C., as well as Arlington, Virginia, so having an unstable foundation is a concern.

There is a retaining wall on the east and south side of the building, retaining a 30 foot drop in grade from the corner of the property down to the building path. That retaining wall varies from rather short, in the range of a foot or two, up to perhaps four and a half feet tall as it traverses the property. The back wall of the existing garage is a part of the three foot retaining wall. The retaining wall is

interrupted by a Sycamore tree which grew as a sapling and is now so large that it has caused failure of a portion of the retaining wall. The entire retaining wall needs to be carefully taken down and put back up to restore it so that it will retain grade properly. There is severe erosion on the slope behind the wall that needs to be stabilized. The slope is, at the same time, being overtaken by invasive plant species, ivy and/or kudzu, so in order to kill off the invasive species and stabilize the ground, substantial landscaping must be done on the slope to restore it.

Technical Staff's proposed definition of the general neighborhood is outlined on Attachment 4 to its initial report, Exhibit 23, which is shown below:

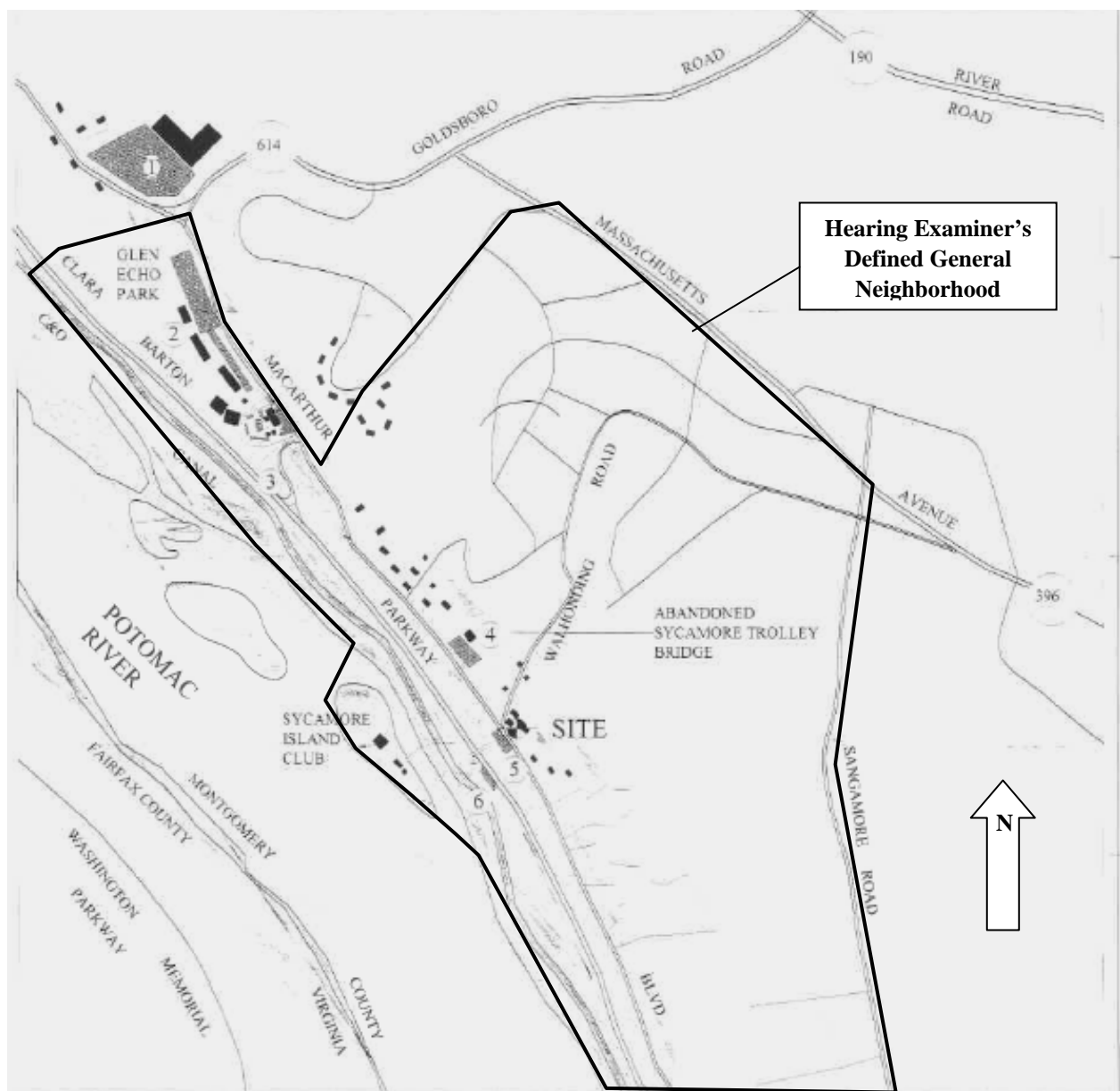


Petitioner's land use expert, William Landfair, proposed a neighborhood definition that was wider in all directions than Technical Staff's. 5/19/06 Tr. 88-89, 127-129. Mr. Landfair's defined neighborhood is bounded by Wiscasset Road to the northwest; Massachusetts Avenue to the northeast; Sangamore Road to the east; Potomac Palisades Park to the south; and the Potomac River to the west. He noted that this definition is broader than he would ordinarily recommend (3,000 feet versus 1,000 feet from the subject site) because many of the interested parties live within that area and the roadways within that neighborhood all either intersect or feed traffic out onto Walhonding Road. On cross-examination by the People's Counsel, Mr. Landfair indicated that you could draw the boundaries more in a linear fashion along MacArthur Boulevard to reflect the Sycamore Store's relationship with other uses along that stretch, such as Glen Echo Park. There are also more people moving along MacArthur than up and down Walhonding, but for the most part they would be commuters.

The People's counsel suggested, by his questions of Mr. Landfair, that the neighborhood should be defined as being limited to the area along MacArthur Boulevard. Mr. Klauber fleshed out his opinion later in the proceedings (5/19/06 Tr. 318) when he asserted that topographically, the site and the store have nothing whatever to do with Glen Echo Heights, a neighborhood physically located at a different elevation. The Sycamore Store is physically nestled on the flat area of MacArthur Boulevard, "which has nothing to do with the Glen Echo Heights residential area at all. It never did."

These distinctions actually have some importance in this case, because the supporters and opponents largely divide into those who consider the Sycamore Store as a commercial endeavor inextricably linked with the historic commercial corridor along MacArthur Boulevard, and those who view it as a quaint entry to their residential community of Glen Echo Heights and the sole visible structure along a stretch of greenery on the Potomac Palisades. In the Hearing Examiner's view, it is all of these things, and the neighborhood definition proposed by Mr. Landfair, if elongated along MacArthur Boulevard to the northwest to include Glen Echo Park and to the west to include Sycamore

Island (which might be affected by parking in the public lot on the west side of MacArthur), would sufficiently encapsulate the interests of all concerned. Mr. Klauber is correct to point out that Sycamore Store is inextricably linked with the historical commerce along MacArthur Boulevard, but the residents of Gen Echo Heights also have a significant interest in maintaining the residential character of their neighborhood, even if it is at a different elevation. It is therefore fair to include both the MacArthur strip and the Glen Echo Heights area within the defined neighborhood, as shown in the following vicinity Map (Exhibit 92):



The immediate area around the subject site is residential, with single-family homes in the R-90 Zone. There are no special exceptions in the general neighborhood area as it was defined by Technical Staff. As depicted on pages 8, 9 and 10 of this report and described on pages 10 and 11, the neighborhood area includes a County-controlled, but unregulated, parking facility which can hold 15 to 18 cars, on the south side of MacArthur Boulevard, opposite the Sycamore Store. To the northwest of the subject site is the Mohican Swimming Pool. Citizens associations in the area include the Mohican Hills Citizens Association (MHCA), which represents properties mostly west of Walhonding Road and the Glen Echo Heights Citizens Association (GEHCA), which represents properties mostly to the east of Walhonding Road.

B. The Master Plan

The property is located within the area covered by the *Bethesda/Chevy Chase Master Plan*, which was approved and adopted in April 1990. It is also listed in the *Master Plan for Historic Preservation*. The Planning Board opined, in both of its letters to the Board of Appeals in this case (Exhibits 37 and 71), that

the special exception application is in conformance with the 1990 Bethesda-Chevy Chase Master Plan. The use will be compatible with existing and planned land uses in the surrounding area. The proposed use will be in harmony with the general character of the neighborhood considering population density, design of the proposed new structure, intensity and character of activity, traffic and parking conditions, and number of similar uses.

The Master Plan specifies guidelines for reviewing special exception applications (pp. 31-32). In summary form, these are:

1. Avoid excessive concentrations of special exception and other nonresidential land uses along major highway corridors. Of particular concern are office uses, which should be discouraged and are better located in areas with commercial zoning.
2. Avoid over-concentration of commercial service or office-type uses in residential communities.

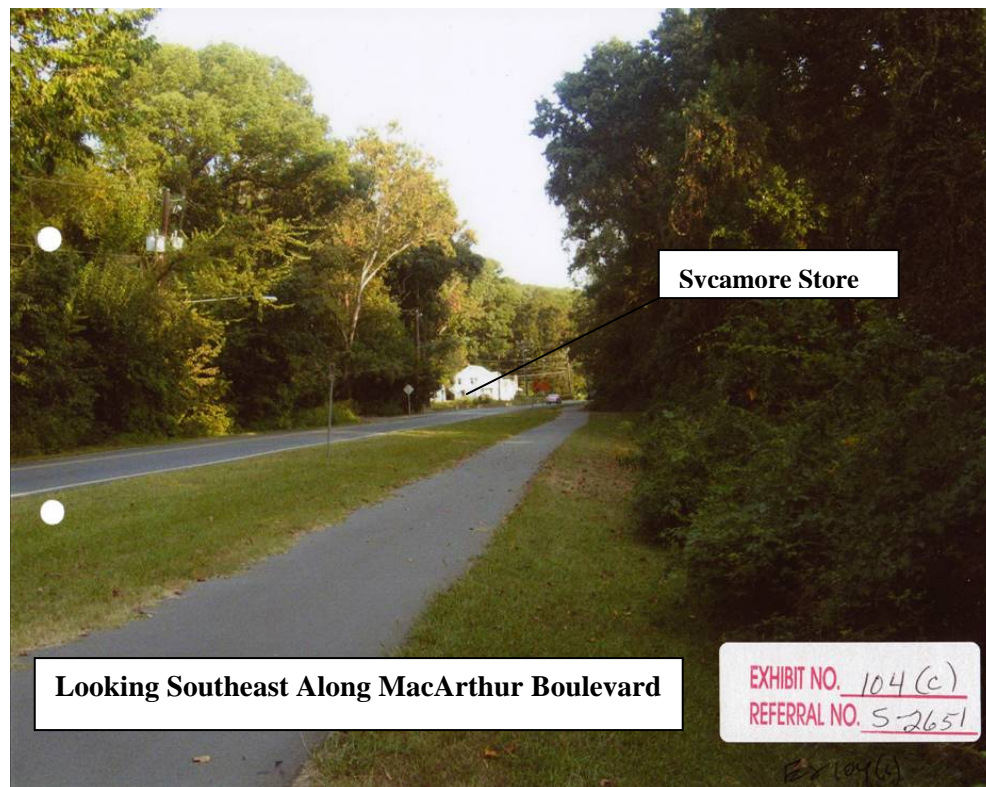
3. Protect major highway corridors and residential communities from incompatible design of special exception uses.
 - a) Any modification or addition to an existing building should be architecturally compatible with the adjoining neighborhood.
 - b) Front yard parking should be avoided, and where that is impossible, it should be allowed only if it can be adequately screened and landscaped.
4. Support special exceptions that contribute to the housing objectives of the Master Plan.
5. Support special exceptions that contribute to the service and health objectives of the Master Plan.

Technical Staff concluded that “the proposed use is consistent with the Bethesda-Chevy Chase Master Plan in terms of the nature and the appropriateness of the use, and it will be compatible with other nearby uses.” Exhibit 23, p. 7. Staff also noted that there are no other special exceptions in the general neighborhood area; that the proposed professional office use will not result in an over-concentration of commercial uses in a residential area; and that the proposal maintains the residential style of architecture. However Staff also observed that the proposal did not meet all of the recommendations in the Master Plan because Petitioner initially planned to locate its parking facility in the front yard along Walhonding Road. As will appear more fully in Part II. C. of this report, Petitioner changed its plans, and the current proposal would put all parking spaces, except for the handicapped space and the visitor’s space, to the rear of the building.⁴

Petitioner’s land use expert, Bill Landfair, opined that the application conforms to the Bethesda/Chevy Chase Master Plan because the use is compatible with its surroundings and the Master Plan supports the existing R-90 Zone, which allows a nonresident professional office by special exception in that zone. His view is hotly contested by Norma Spiegel, an opponent of this application. 5/19/06 Tr. 246-268. Ms. Spiegel quoted the Master Plan’s language (cited above) discouraging office uses in residential areas, and was especially animated in her defense of the scenic Potomac Palisades area along the MacArthur Boulevard corridor, which the Master Plan seeks to

⁴ Even under the original proposal, Technical Staff recommended approval, finding that placement of the parking facility in the front did not create a commercial appearance which would adversely affect the neighbors because of the topography.

preserve for its “unique environmental features.” Master Plan, pp. 64-70. Another opponent, Ron Nessen, also emphasized how the Sycamore Store stands out as the lone building along the scenic MacArthur Boulevard corridor, introducing a photograph (Exhibit 104(c)) of a stretch of MacArthur and the Sycamore Store, to prove his point 5/19/06, Tr. 207-210. It is reproduced below:



Technical Staffer Dan Janousek testified that the proposed development is not inconsistent with the goal of the Master Plan to preserve the scenic beauty of the area. It does not remove any significant trees or vegetation; it maintains the hillside; and it does not add any additional curb cuts on MacArthur Boulevard. Technical Staff believes the addition of all the landscaping here actually will improve the resource by making the site greener and more pleasant. 4/10/06 Tr. 201.

This is another one of those instances where all sides have made good points. The heartfelt efforts of the opponents to preserve the residential character of their neighborhood and to protect the scenic beauty of the Potomac Palisades are laudable; however, the proposed use, if properly

conditioned, should not defeat the opponents' underlying goals or change the area substantially. The Sycamore Store already exists; it already stands out along MacArthur Boulevard; it has already been used for many years as a commercial establishment, although not since 1995; it's size will not be expanded by Petitioner and its architecture will not be changed; it will be restored from its present dilapidated condition; its proposed parking will be mostly in the rear; and it will be better landscaped than it is presently.

In light of these facts, the Hearing Examiner finds that Petitioner's proposed use will not make the area any less scenic, especially since the plan revisions will move almost all the parking to the rear of the building. The proposal will add an office use to the area in spite of the language in the *Bethesda-Chevy Chase Master Plan* discouraging it, but the Hearing Examiner must read that Master Plan in conjunction with the *Master Plan for Historic Preservation*, which seeks to preserve this site through an adaptive re-use, as spelled out in the letters from the Historic Preservation Commission (Exhibits 30 and 140). The impact of the Historic Preservation program on this case will be addressed again in subsequent parts of this report. Suffice it to say, at this point, that the Hearing Examiner finds this proposal to be in substantial compliance with the Bethesda-Chevy Chase Master Plan, when considered in the context of this historic structure.

C. The Proposed Use

As previously mentioned, Petitioner proposes to renovate the Sycamore Store building and improve the site for office use. Petitioner states in its Consolidated Statement of Operations (Exhibit 166, p. 4) that it will not expand the size of the existing structure, nor in any way increase the usable area of the primary structure, beyond the enclosure of the existing screened porch and erection of an exterior staircase from the existing rear balcony on the second floor, for fire egress purposes. Petitioner will restore and maintain the structure in accordance with applicable Historic Preservation regulations.

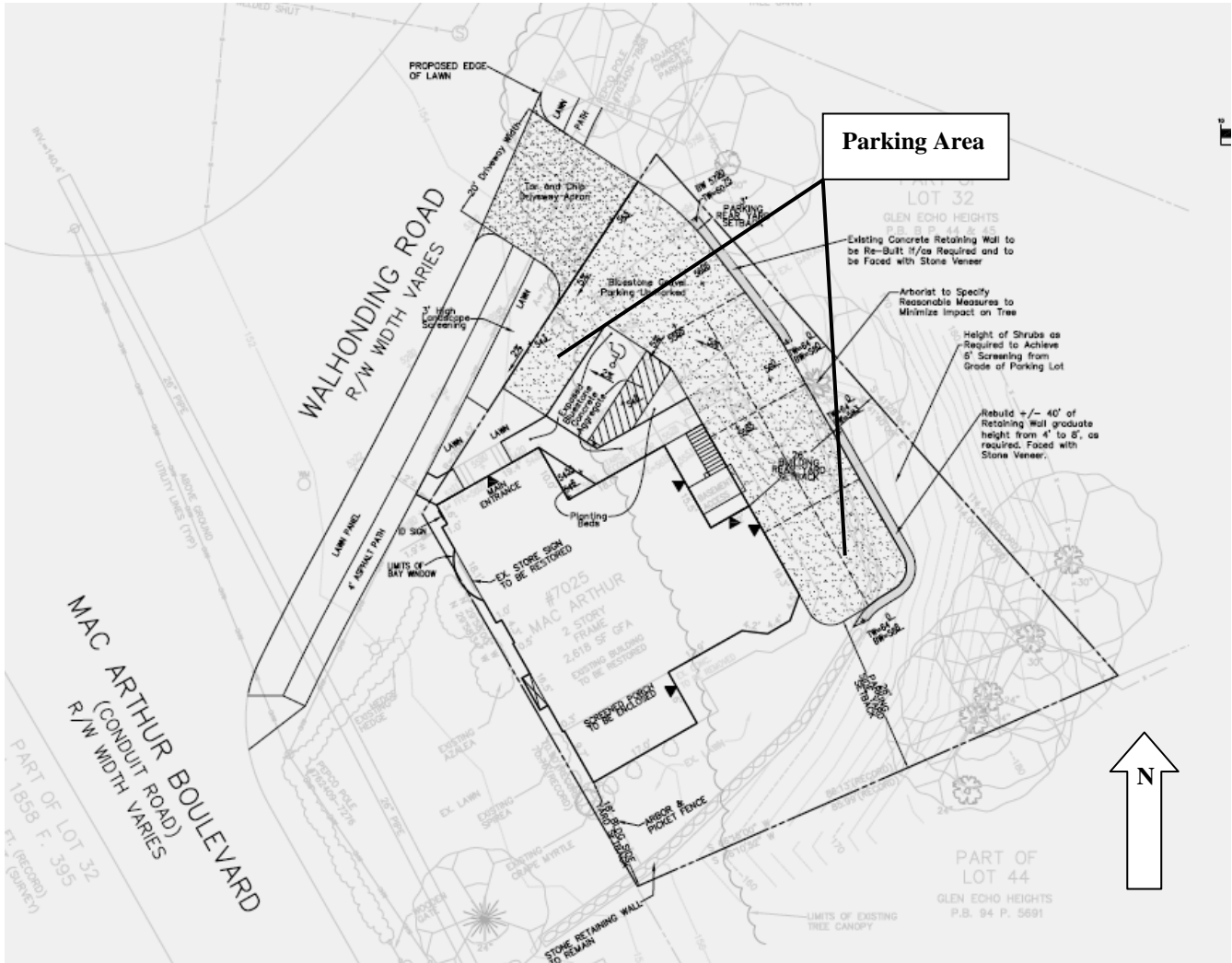
Mr. Brenneman testified⁵ that his background is as an historic preservationist. He served as the Chair of Rockville's Historic District Commission, and on the Board of Montgomery Preservation as both its Vice President and Treasurer, and with other historic preservation groups. He hopes to produce a building that accomplishes historic preservation through a “thoughtful, adaptive reuse,” and an office “that [speaks] to what we do and what we stand for.” The following is a list of planned improvements, as reported by Technical Staff (Exhibit 23, p. 4) and updated by the Hearing Examiner:

- Remove a small, detached garage from the property
- Provide gravel parking spaces for seven (7) standard vehicles
- Provide one (1) paved van-accessible parking space for persons with disabilities
- Provide building access for persons with disabilities
- Enclose the existing screened-in porch
- Install new Landscaping and lighting
- Improve existing retaining walls
- Construct a new retaining wall
- Construct exterior stairs from the existing rear balcony
- Preserve the “Sycamore Store” sign along MacArthur Boulevard and install ground level lighting on the MacArthur Boulevard side of the building to light the sign and the wall of the building
- Erect one additional business occupant sign
- In-ground light fixtures are proposed to illuminate the wall along MacArthur Boulevard, and residential style wall lighting will be installed next to each door. Lighting will not operate between the hours of 9:00 p.m. and 7:00 a.m. daily.

1. Exterior Renovations:

Mr. Brenneman testified that this restoration will require considerable work and great expense. He intends to underpin and shore up the failing foundation, and to restore the entire exterior of the property. To do so, he will replace the failing roof and restore the soffits and fascias, the exterior siding and the bow window at the front of the store. He will also remove window grills and the window air conditioners, and put up new gutters and down spouts. The entire retaining wall will be carefully taken down and put back up so that it will retain grade properly, and the slope behind the wall, which is severely eroded, will be stabilized. The following revised Site Plan (Exhibit 167(a)), shows the intended layout of the project, Parking Standards, General Notes and Development Standards:

⁵ 4/10/06 Tr. 222-290; 5/12/06 Tr. 17-91, 112-243; 5/19/06 Tr. 272-288; 11/17/06 Tr. 17-54, 118-129.



PARKING STANDARDS

	REQUIRED / ALLOWED	PROPOSED
PARKING REQUIREMENT	6.55 SPACES (2,618 SQUARE FEET @ 2.5 SPACES / 1,000 SQUARE FEET GFA)	7 AUTOMOBILE SPACES 1 VAN ACCESSIBLE SPACE
PARKING SETBACKS		
FRONT (WALHONDING ROAD)	30 Feet	0 Feet
SIDE	16 Feet	26 Feet
REAR	25 Feet	3 Feet

GENERAL SUBJECT NOTES:

1. THE PROPERTY IS 6,873 SF OR 0.15778 ACRES.
2. THE SUBJECT PROPERTY IS LOCATED ON MONTGOMERY COUNTY TAX ASSESSMENT MAP GM563, WITH A TAX ACCOUNT NO. OF 00507922.
3. THE SUBJECT PROPERTY IS COMPRISED OF PART OF LOT 32, BLOCK 2 GLEN ECHO HEIGHTS, BETHESDA MARYLAND. PROPERTY RECORDED IN LIBER 27528 AS FOLIO 800 AMONG THE LAND RECORDS OF MONTGOMERY COUNTY, MARYLAND, BEING THE SAME LOT CREATED BY DEED AND RECORDED ON NOVEMBER 9, 1953 IN LIBER 1858 FOLIO 395 AMONG THE LAND RECORDS OF MONTGOMERY COUNTY, MARYLAND.
4. THE SUBJECT PROPERTY IS LOCATED ON WSSC MAP 207NW06.
5. THE SUBJECT PROPERTY IS LOCATED IN FLOOD ZONE "C" PER H.U.D. FLOOD INSURANCE RATE MAPS COMMUNITY PANEL NUMBER 240049-0175 C.
6. THE SUBJECT PROPERTY IS ZONED R-90. THE EXISTING STRUCTURE IS PROPOSED FOR PROFESSIONAL OFFICE UNDER THE NON-RESIDENT PROFESSIONAL OFFICE SPECIAL EXCEPTION CATEGORY. THIS SPECIAL EXCEPTION USE IS ALLOWED IN THE R-90 ZONE PER THE ADOPTION OF TEXT AMENDMENT 05-01.
7. THIS SITE IS LISTED IN THE MONTGOMERY COUNTY LOCAL ATLAS INDEX OF HISTORIC SITES AS SITE NO. 35-155.
8. CURRENT OWNER OF RECORD: BRENNEMAN, DEAN K. ET AL
9. PREMISES ADDRESS: 7025 MAC ARTHUR BLVD. BETHESDA MD. 20816-1042

DEVELOPMENT STANDARDS

LOT IS "NOT NON-CONFORMING" PER SECTION 59-B-5.3 OF THE ZONING ORDINANCE.

STRUCTURE IS "NOT A NON-CONFORMING BUILDING" PER SECTION 59-B-5.3 OF THE ZONING ORDINANCE.

	REQUIRED/ ALLOWED	EXISTING/ PROPOSED
LOT AREA AND WIDTH *		
MINIMUM NET LOT AREA	5,000 SQ. FT.	6,873 SQ. FT.
MINIMUM LOT WIDTH AT FRONT BUILDING LINE	50 FEET	67.9 FEET
COVERAGE		
MAXIMUM PERCENTAGE OF NET LOT AREA THAT MAY BE COVERED BY BUILDINGS INCLUDING ACCESSORY BUILDINGS	30% MAXIMUM	19.7%
GREEN AREA	25% MINIMUM	48.0%
SETBACKS *		
SETBACK REQUIREMENT FOR MAIN BUILDING:		
MACARTHUR BOULEVARD (STREET)	25 FOOT MINIMUM	1.9 FEET
WALHONDING ROAD (STREET)	25 FOOT MINIMUM	1.2 FEET
SIDE LOT	7 FOOT MINIMUM	18 FEET
REAR LOT	20 FOOT AVERAGE WITH 15 FOOT MINIMUM	26 FEET
MAXIMUM BUILDING HEIGHT	35 FEET	22.75 FEET
PARKING **		
2.5 SPACES FOR EACH 1,000 SF GROSS FLOOR AREA OFFICE	7 SPACES	8 SPACES

* THE 1950 ZONING ORDINANCE SHALL APPLY TO THESE DEVELOPMENT STANDARDS GIVEN THAT THE PROPERTY WAS RECORDED PRIOR TO DECEMBER 8, 1958.

** WAIVERS WILL BE REQUESTED FROM PARKING STANDARDS PER SECTION 59-E-4.5 OF THE ZONING ORDINANCE.

2. Interior Renovations and Planned Use:

On the interior, in addition to the new foundation, the building will have to be entirely rewired. A new heating system and air conditioning system will be installed, along with new plumbing. The sewer line to the street has been invaded by roots and has to be replaced as well. Thus, the building needs entirely new utilities, as well as structural shoring up, renovation and repair, inside and out.

Mr. Brenneman suggested that “This is way beyond the average ‘Harry Homeowner’ fix-up, and it’s why it didn’t sell in six months on the market to homeowners at a time when home prices were going through the ceiling.” 5/12/06 Tr. 133. He estimated retail repair costs between three quarters of a million and a million dollars to fully restore the building, inside and out.⁶

Petitioner is proposing to use the front part of the store as a reception and waiting area. At the back would be a small kitchenette and work room, with a bathroom on the first floor for convenience as to well as to meet Americans with Disabilities Act requirements. The living room would be essentially unchanged and used as a conference room. The dining room would be converted to an administrative office area. A partner’s office would be located in what was the kitchen and breakfast room, and another partner’s office in what was the screened-in porch. Upstairs, Petitioner would have a desk area for three architects, as well as a general work area for blue printing and flat files, and a bathroom.

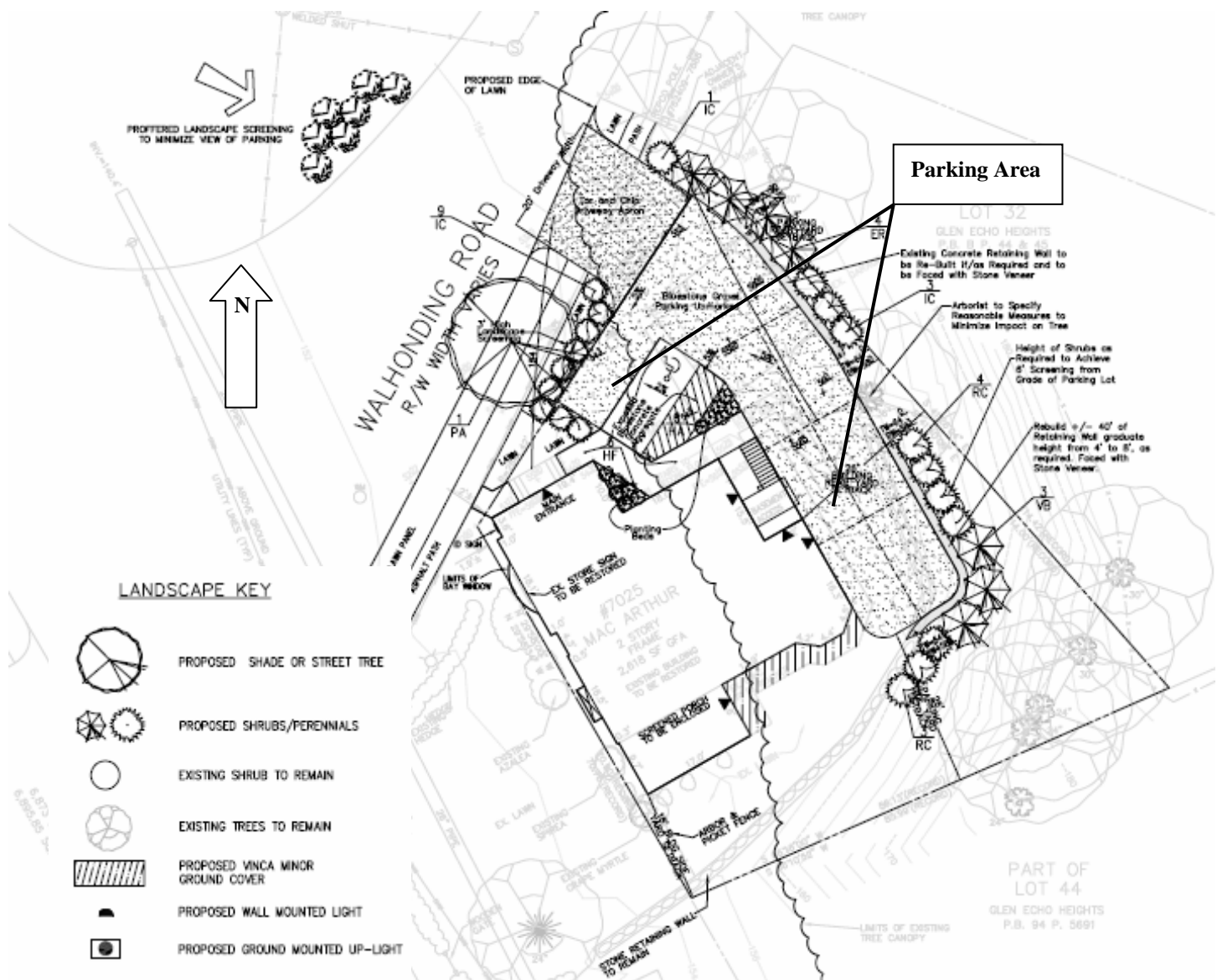
According to Mr. Brenneman these changes will be in compliance with the building code, but they will not affect the exterior envelope of the building.

3. The On-Site Parking Facility:

Petitioner is proposing an eight-car parking lot, including one handicapped space and one space for visitors. Originally, a seven-car lot was proposed, as required by the size of the building and the area calculations, but a subsequent redesign moved six spaces to the rear of the building, and allowed two spaces (the handicapped space and the visitors’ space) to remain adjacent to Walhonding. The parking lot would be constructed in blue stone gravel, with the exception of the van accessible space which will be constructed of concrete, with an exposed blue stone gravel aggregate. Petitioner will use an asphalt tar and chip apron to further “deformalize” that parking area.

⁶ Mr. Brenneman’s estimate was disputed by John Juenemann, a painting and general contractor, who opposes the petition. Mr. Juenemann estimated that the work could be done for \$350,000 because much of it is just “cosmetic.” (5/19/06 Tr. 158-195). Because of Mr. Brenneman’s extensive experience with renovations of historic properties (Exhibit 102, p. 2), the Hearing Examiner credits Mr. Brenneman’s estimates; however, even if the renovation could be properly done for less money, the fact remains that it will be very expensive by all accounts.

The handicapped space will be used only for that purpose, and to provide a turn-around area when it is not occupied. This will allow Petitioner to “juggle the vehicles” without going out into Walhonding Road. This arrangement also allowed an improvement of landscape screening as shown in the revised Landscape Plan (Exhibit 127(b)), which depicts an area of three-foot tall plantings, screening the additional parking space (which Mr. Brenneman described as a “visitor/flex parking space”) and the van accessible parking space from the public right-of-way. There is a six-foot hedge in the rear which screens the adjacent property from the parking facility.



During the weekly staff lunch and meeting, there will be no meetings with clients and subcontractors or other suppliers so as to avoid overburdening the parking lot. There will be a formalized parking plan and all employees of the firm will be instructed in the operation of this parking plan. There will be a keyboard in the reception area of the office where every person coming in will put their keys in places corresponding to the parking spaces marked on a map. Additional copies of all employees' keys will be kept in a lock box in the office, and employees will be instructed on safety. The general idea would be to put the administrative people in the inner spaces. This is all incorporated in the Consolidated Statement of Operations (Exhibit 166).⁷

Mr. Brenneman stated that, as a part of this proposal, Petitioner has added six-foot screening all along the perimeter of the parking area, wherever it faces an adjoining property, except for where the sycamore tree is located. Petitioner will also add a street tree at the front of the property, all in an effort to better screen the parking areas. Moreover, the subject site will not be used for construction equipment or heavy trucks because Petitioner will continue to operate its sites in Kensington, Maryland and Orange, Virginia for receipt and storage of building materials and equipment.

Nevertheless, the proposed parking facility has engendered considerable opposition from the neighbors, who contend that, at the very least, it will be an eyesore to have seven or eight cars parked on site. In the opinion of the Hearing Examiner, this was a much more serious issue under the original parking plan, which would have located seven vehicles visibly along Walhonding Road. However, Petitioner agreed to move most of the parking lot to the rear of the building, as shown on the current site plan.

In fact, prior to Petitioner's revision of the plans which moved most of the parking to the rear of the building, the Hearing Examiner asked Ron Nessen, a staunch opponent of this petition, what, if any, conditions could be imposed on this proposal that would make it acceptable to him and more

⁷ Mr. Brenneman's one disagreement with Technical Staff regarding parking is that Staff wants the eighth space to be dedicated as a visitor's parking space, and Petitioner wants a little more flexibility.

compatible with the community. Mr. Nessen replied, “. . . if you can find a way to put the cars behind the building where I can't see them from my house and where they will not stand out so much when you drive along MacArthur Boulevard . . . that certainly goes a long way to meeting my objection and I think probably the objection of others.” 5/19/06 Tr. 222-223. He indicated that he had said the same thing to Mr. Brenneman, who then drew up plans to place six cars behind the building, in three rows of two cars, but those plans “just disappeared.” He added that “if you have six cars behind the building without a big parking lot . . . on the site it would be a much less intense usage. And I think, you know, the screening would also make it less intensive, would make it stand out less. But parking is really the major problem.” 5/19/06 Tr. 223-224. The Hearing Examiner finds that the movement of the parking facility to the rear of the building has largely eliminated the issue of an unsightly, commercial-looking parking facility imposing upon the residential surroundings.

Opponents of this petition also argue that the proposed parking facility represents a danger to traffic on Walhonding Road because the driveway is allegedly too close to the intersection of MacArthur Boulevard and Walhonding Road. However, **all** of the expert testimony supports the conclusion that the location of the driveway, especially in the current plan, is not dangerous either to vehicles using the driveway or to traffic on Walhonding.

Even under the original proposal, which placed the edge of the driveway apron about 25 feet closer to the intersection than under the revised plan, Transportation Planning Staff determined that “the proposed special exception use satisfies the Local Area Transportation Review test and will have no adverse effect on nearby roadway conditions or pedestrian facilities.” Exhibit 23, p.10 and Attachment 10, p.1. Technical Staffer Dan Hardy also testified that he evaluated the safety of the driveway that connects to Walhonding from the on-site parking facility, and he did not have concerns about it. Although he had not done a formal sight-distance study, his assessment is that there is adequate sight distance at that location, and in his opinion, it is safe. Mr. Hardy also felt that the

internal operation of the parking facility, even with its close quarters, would not be dangerous.

11/17/06 Tr. 54-80.

Finally, there was expert testimony from Stephen Petersen, Petitioner's traffic engineer and transportation planning expert. On the second day of his testimony (*11/17/06 Tr. 92-117*), Mr. Petersen evaluated the revised parking arrangement. In his opinion, it is a more functional plan than the original one, under which it was more likely that people would have to back out into Walhonding Road in order to get in and out of the spaces. Under the revised plan, the way the parking is set up, with two spaces that are at right angles to the general parking aisle, there will be the opportunity and space to turn vehicles on site so that they can leave the site in a forward position, which gives improved sight distance and improved opportunity to observe conditions. It is therefore a safer and more functional plan.

Given the fact that this is not a high turnover parking facility, that it is an office where there will not be a lot of in-and-out activity and that there is an adequate parking management plan, in Mr. Petersen's opinion, the revised parking arrangement will work very well. Mr. Petersen also indicated that you don't need a drive aisle between cars in a parking lot with only six tandem spaces.

Mr. Petersen opined that the revised plan improved the visibility and safety for turning movements out of the driveway because the measuring point that you use to determine sight distance is now moved further away from the intersection by eliminating a 25-foot portion of the driveway apron. Under County standards, you pick a point in the middle of the remaining 20-foot wide driveway, six feet back from the edge of the public right-of-way (*i.e.*, the point where the eye of the driver making the observation is located), and you draw the line of sight from that point to the center line of MacArthur Boulevard, which is a sight distance of 122 feet.

In Mr. Petersen's opinion, the speed of a vehicle around the turn onto Walhonding is about 20 MPH by virtue of the curvature. At that speed, the required sight distance, according standards of the

American Association of State Highway and Transportation Officials (AASHTO), is 115 feet (75 feet for reaction time plus 40 feet for stopping time), well within the 122 foot sight distance in this case.

Mr. Petersen used AASHTO standards because the County table of sight distance doesn't go below 25 MPH. The AASHTO standard is very conservative because it assumes a 2.5 second non-emergency reaction time. In emergency situations, drivers typically react more quickly than 2.5 seconds, as low as 3/4 of a second, which would further reduce the total stopping distance. Mr. Petersen drew in the sight distances on Exhibit 150, which is reproduced below. It should be noted that this exhibit also makes it easier to visualize the parking arrangement because cars are drawn in their parking spaces.



The County standard for sight distance at 25 MPH is 150 feet (and AASHTO's is 155 feet at that speed), but Mr. Petersen feels that a sight distance of 122 feet is adequate because, as mentioned, cars slow down to about 20 MPH when rounding a corner like this one (even if the posted speed on MacArthur is 30 MPH) and because the design standards assume a slower reaction time than occurs in emergencies. In Mr. Petersen's opinion, the access and circulation for the proposed parking facility are safe and efficient for both pedestrian and vehicular traffic, and the requested waivers, if granted, would not impinge on safety or operation of the facility.

In spite of the concerns expressed by Ron Nessen and other opponents about the functionality and safety of the proposed parking facility, the expert evidence is overwhelming that it will function well and safely. The Hearing Examiner must consider evidence on these points, not just generalized concerns, and therefore finds the proposed parking facility to be appropriate. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93, 262 A.2d 499, 504-505 (1970).

4. The Parking Regulation Waivers:

Under the original parking plan, at least five different waivers of parking regulations would have been required for approval of this special exception. Moving most of the parking spaces to the rear of the building has reduced the number of waivers needed and the extent of some of them.

The Parking Facility Waivers currently sought are:

- Waiver of 22 feet of the 25-foot rear yard setback required by Section 59-E-2.83(b);
- Waiver of Section 59-E-2.83(c)'s requirement for six-foot high screening from adjacent properties and three-foot high screening from the street (Most of required screening will be provided, but it will be interrupted in the rear by a sycamore tree);
- Waiver of Section 59-E-2.43's requirement for a curb separating parking spaces from the street and sidewalk; and
- Waiver of Section 59-E-2.21's requirement for marking of parking spaces.

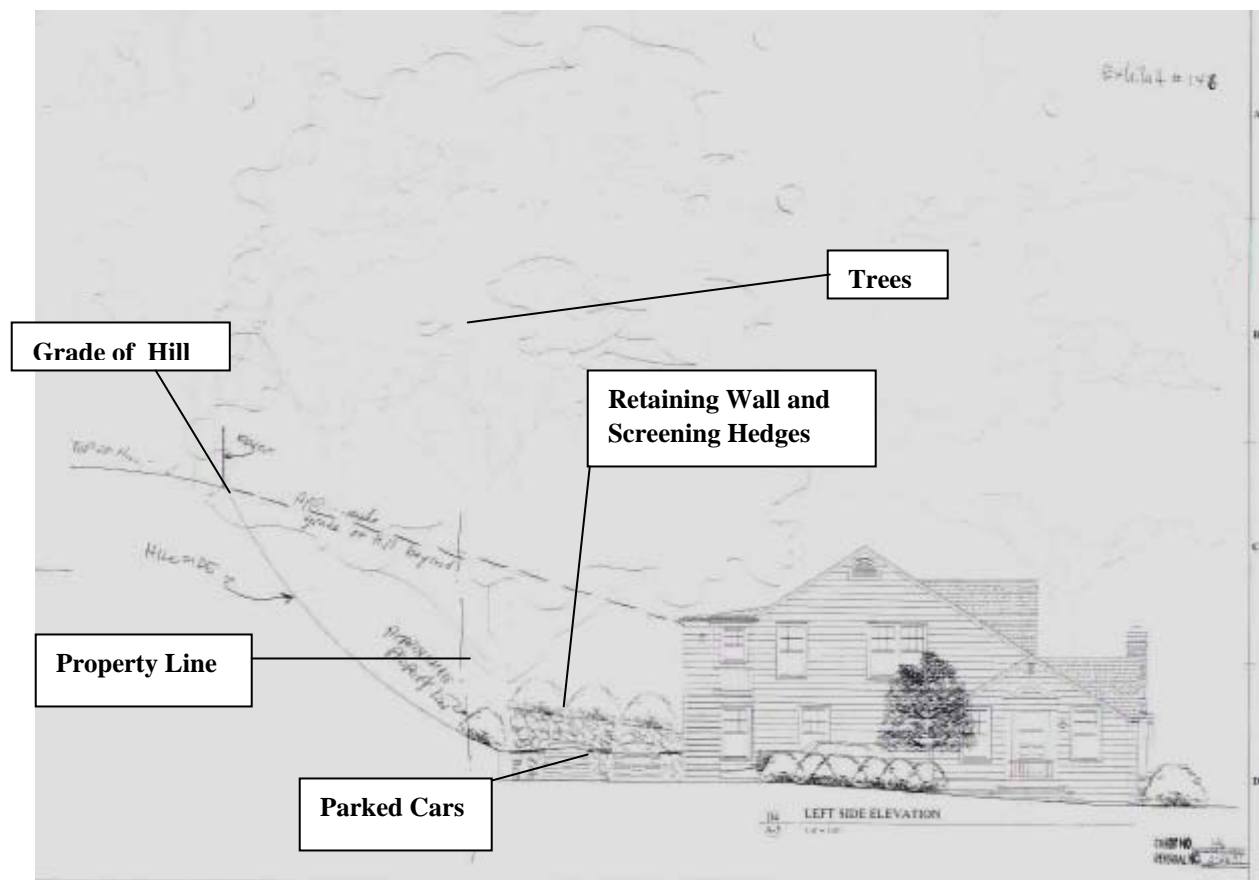
The Board of Appeals is authorized, pursuant to Zoning Ordinance §59-E-4.5, to waive any requirement not necessary to "accomplish the objectives in Section 59-E-4.2." As required, notice of

the waiver requests was sent to all adjoining property owners and affected citizen associations for comment. Those in the opposition in this case, including the Glen Echo Heights Citizens Association, oppose the granting of these waivers because they feel that a parking facility for eight cars will over-commercialize their neighborhood. Technical Staff thoroughly analyzed Petitioner's initial waiver requests in their Supplemental Report (Exhibit 67, pp. 10-15), and recommended that they be approved. Their analysis applies with equal force to the current reduced set of parking waiver requests.⁸

The provisions of Section 59-E-4.2 seek to protect the safety of pedestrians and motorists who use the parking facility and adjoining lands and public roads, and to prevent adverse effects from noise, lights and fumes. These goals can be accomplished by a combination of setbacks, perimeter landscaping, walls, fences and other natural features or improvements.

Technical Staff felt that none of the requested waivers would create negative effects to the adjoining land or create safety concerns for pedestrians and vehicles. They observed that the 30-foot elevation difference between the parking facility and the nearby houses will minimize the noise, glare, fumes and light, and effectively screen the parking facility from adjacent and abutting properties. Trees and other natural vegetation currently exist on the subject property, which will also help to screen the parking facility from adjacent properties. These will be supplemented with other landscaping. The protective effect of the difference in elevation is illustrated on the following page by Exhibit 146, which shows the steep hill directly behind the Sycamore Store, with the proposed parking nestled at its base:

⁸ It should be noted that in its revised plans, Petitioner reversed the designations of side yard and rear yard, as it is permitted to do since the subject site is a corner lot and therefore may be considered to front on either street. Under the current designation, the rear yard is the one opposite (*i.e.*, on the other side of the house from) MacArthur Boulevard, and the side yard is the one opposite Walhonding Road. The Hearing Examiner feels this is a more appropriate designation than the initial one because the property has a MacArthur Boulevard address.



Technical Staff also mentioned that pedestrians and motorists will be able to access the building safely from the parking facility or the outdoor public parking areas. They noted that traffic on Walhonding Road is generally minimal, and that Petitioner will install a sidewalk. Appropriate lighting is proposed for the parking area, and it will be consistent with existing lighting on the property that is angled down to reduce glare, while providing safety for pedestrians.

Technical staff believes that the requirement for a curbed separation of the parking facility does not need to be met in order to satisfy the overall objectives of Section 59-E-4.2. The parking facility will not encroach into the roadway because a wide grass apron and a sidewalk are proposed. The seven standard vehicle parking spaces will not be striped or marked because they will have a gravel surface for historical appearance, but Technical Staff found that they will provide for safe and adequate loading, given the small size of the facility and its proximity to the building. Staff also

concluded that existing and proposed trees and landscaping will shade more than the required 30 percent of the paved area of the parking facility.

The parking waiver issue was also addressed by Petitioner's traffic engineer, Stephen Petersen, and Petitioner's land use expert, Bill Landfair. Mr. Petersen opined that granting the requested waivers would not impinge on safety or operation of the parking facility. 11/17/06 Tr. 116. Mr. Landfair discussed each of the requested waivers, and concluded that the granting of those waivers would still allow Petitioner to achieve the purposes of the parking regulations. 11/17/06 Tr. 130-132. He noted that the revised plans have added considerable additional screening both along the frontage with Walhonding Road, with three-foot hedges on a landscape strip, and along the rear and side property lines, with a retaining wall and six-foot hedges screening the parking from the adjacent residential property. He joined in Technical Staff's observation that the proposed parking facility will be less visible from adjacent properties, because they are located at much higher elevations than the subject site. Mr. Landfair also defended the use of blue stone chipped gravel instead of a hard surface in keeping with the historic setting of the property, even though it doesn't lend itself to the kind of demarcation of parking spaces called for in the Zoning Ordinance.

Based on all the evidence, the Hearing Examiner concludes that the redesigned and relocated parking facility will have a more residential appearance, and that the specified parking regulations can be waived because they are "not necessary to accomplish the objectives in Section 59-E-4.2."

5. Landscaping, Lighting and Signage:

Petitioner will be adding substantial landscaping to the property, as can be seen on the revised Landscape Plan, Exhibit 127(b), reproduced on page 22 of this report. Much has already been said about the landscaping in connection with the previous two sections discussing the parking facility and requested waivers of parking regulations. It should be noted that a condition is being recommended that requires Petitioner to trim the hedges along Walhonding and maintain them at a height of

approximately three feet, so that they will not block the sight line of vehicles emerging from the planned driveway.

The sidewalk proposed by Petitioner is labeled “Asphalt Path” on the site and landscape plans. Petitioner added it to the plans when community resident Norma Spiegel expressed a concern that people could currently walk to the corner on the gravel shoulder, and that there should still be a way for people to safely walk south on Walhonding to the corner.

Mr. Brenneman testified that Petitioner’s concept of lighting is to make the site look like a residence from a lighting point of view. 4/10/06 Tr. 263. Lighting will not operate between the hours of 9:00 p.m. and 7:00 a.m. daily. At each doorway to the building, a light fixture of a residential nature would be installed. Locations of lighting fixtures are set forth in the Landscape Plan (Exhibit 127(b)) and the Lighting Plan (Exhibit 127(d)). They are also noted in red on Exhibit 94 (labeled “Lighting Elevations”), and Mr. Brenneman drew in the approximate area of light dispersion from each light on that exhibit. Exhibits 94 and 127(d) are reproduced below.



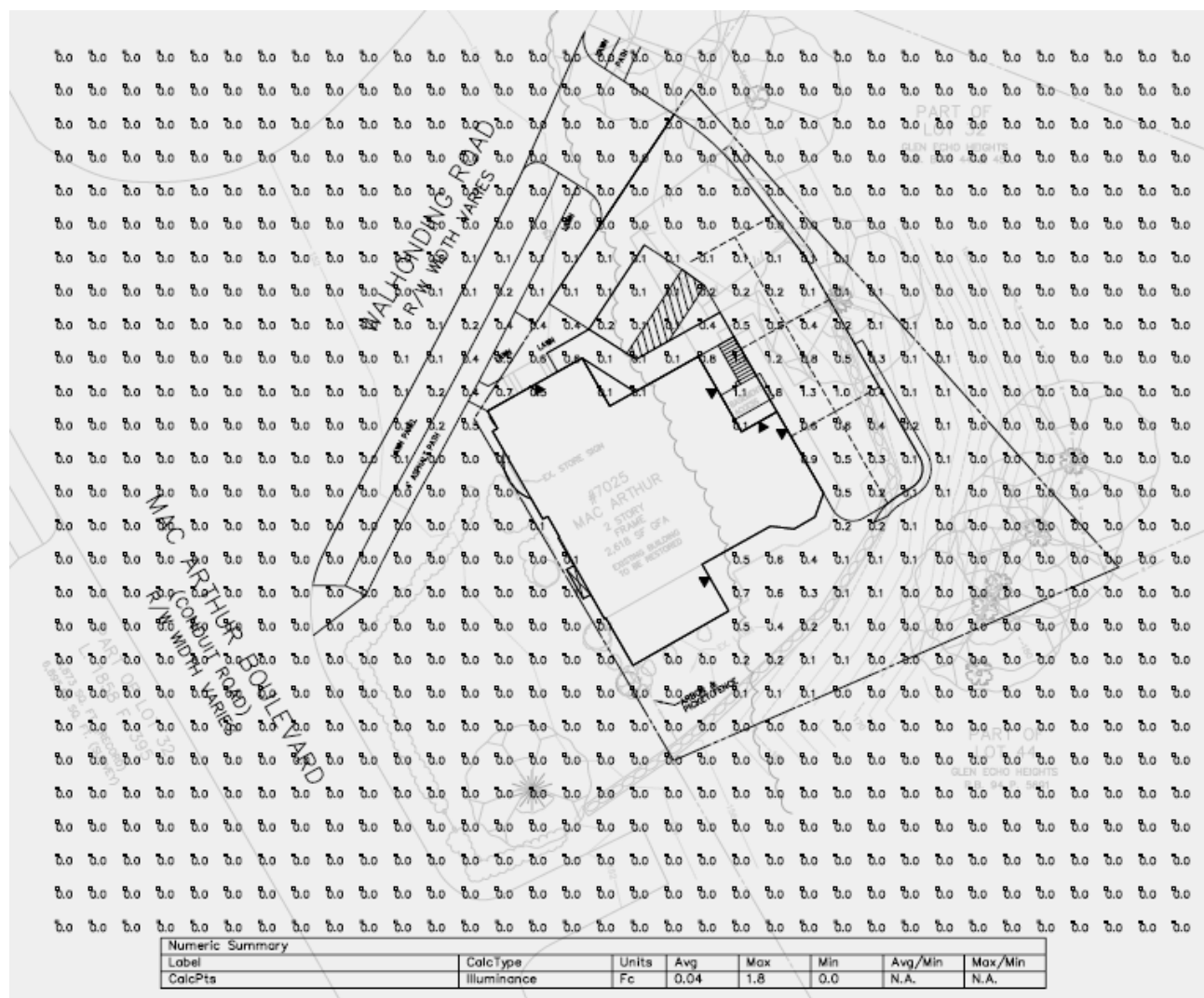


Exhibit 127(d) includes a photometric study demonstrating that lighting at the side and rear property lines does not exceed the 0.1 footcandles, as specified in Zoning Ordinance §59-G-1.23 (h) for residential zones. In this instance, the lighting proposed will be mostly wall mounted, residential style fixtures, all but one next to a doorway. They will be set and controlled by timing mechanisms, so they will be on for limited periods of time. There is one spotlight, which is located at the northwest corner of the building, expressly for the purpose of lighting up a very small sign on the building, identifying the office. That light is directed simply onto the sign, and according to Petitioner's land use expert, there should be very little, if any, spread.

Technical Staff concluded that the proposal to light the building and the parking facility with

standard residential fixtures is consistent with residential lighting in the general neighborhood area. Exhibit 23, p. 12. The lighting will not spill directly onto neighboring properties, as shown on the Petitioner's plan for residential lighting fixtures installed on the building. The Hearing Examiner agrees with Technical Staff's observation that, given the topographical conditions and tree screening on the property, lighting and noise from the building and the parking facility should not have an adverse impact on adjoining properties.

Petitioner proposes that there be two signs on the property. Petitioner would restore the lighted Sycamore Store sign, which is itself considered an historic artifact. Petitioner also proposes an additional, code-compliant sign (*i.e.*, less than two square feet) for his professional office. Both of these signs are shown on the Landscape Plan, and in the upper left hand Elevation of Exhibit 94, reproduced on a page 32 of this report. The existing Sycamore Store sign can also be seen in the photos on pages 6 and 7 of this report. None of the participants in this case objected to the proposed signage, and Petitioner would be required by recommended conditions to obtain permits for his signs from DPS, pursuant to Code §59-F-9.1(a), and to file copies with the Board.

6. Public Facilities:

A Preliminary Plan of Subdivision is not required for the subject application, and therefore the Board of Appeals must determine the adequacy of public facilities. Petitioner's land use expert, William Landfair, testified that there is adequate public water and sewer service in the area to serve this use. Given the nature of the special exception, it will have no impact on school capacity. The only dispute regarding public facilities concerned traffic and parking.

Opposition lay witnesses testified that there is considerable traffic and there are some backups along Walhonding Road. Peter Winch, Second Vice President of the Glen Echo Heights Citizens Association, testified that cars waiting at the stop sign on MacArthur Boulevard that will allow them access to the Clara Barton Parkway sometimes back up all the way to Walhonding Road. This results

in cars from Walhonding waiting to get onto MacArthur. 11/4/05 Tr. 170-172. Ron Nessen echoed these comments and observed that Walhonding Road is a narrow, twisting street, which is poorly maintained, but has a lot of traffic. He said it is used as a cut-through by people going from Massachusetts Avenue to MacArthur Boulevard, and the other way. Mr. Nessen feels that the proposed use would create traffic problems and dangers. 5/19/06 Tr. 210-211.

The traffic engineering experts reached a contrary conclusion. Technical Staff's analysis yielded the following conclusion (Exhibit 23, p. 12):

. . . The traffic impact on nearby residential streets will be limited, with vehicles entering the property from Walhonding Road at [a] location close to a [sic] MacArthur Boulevard, which is a major arterial roadway. **The impact of traffic generated by the proposal will not create an adverse impact on the adjacent roadway network and it will generate fewer than 30 peak hour trips during the morning and evening peak hour traffic periods.** The petitioner expects approximately two visits per week from clients, and random visits from employees. The petitioner's employees typically will drive to and from the office in their own automobiles, company vans and company pickup trucks for short visits. These short visits by employees and the limited visits by clients will not create adverse impacts to the neighborhood. [Emphasis added.]

Because the site would generate fewer than 30 total peak-hour trips during the morning and evening peak periods, Transportation Planning staff determined that a traffic study was not required to satisfy Local Area Transportation Review [LATR]. Nevertheless, Petitioner's traffic engineer, Stephen Petersen, did do a traffic study, fully reviewing trip generation and other issues that were raised regarding the intersection of MacArthur Boulevard and Walhonding Road. In Mr. Petersen's expert opinion, the proposed use will not create a nuisance because of traffic movement entering and exiting the parking facility or because of traffic volume. *See* Exhibit 87(a) and 5/19/06 Tr. 9-78.

Applying Park and Planning's trip generation guidelines for offices, Mr. Petersen determined that the site would generate four trips in the morning peak hour and seven trips in the evening peak hour, clearly below the threshold of 30 trips listed in the LATR guidelines that would require a full traffic study. He also compared the square footage of the building with what Park and Planning

would describe as a commercial use, and the guidelines say it would generate five trips in the morning peak hour and 20 trips in the evening peak hour.

Mr. Petersen did a traffic count during weekday peak hours and calculated critical lane volumes (CLV) at the MacArthur/Walhonding intersection of 965 in the morning peak hour and 671 in the evening peak hour.⁹ The critical lane threshold congestion standard for this policy area in the County is 1600, so Mr. Petersen concluded that the intersection is operating well below what the County considers a congested level of 1600. The proposed use would add a maximum of four trips in the morning, bringing the a.m. CLV to 969, and seven in the evening, bringing the p.m. CLV to 678.

Mr. Petersen also posted a second person at the intersection at MacArthur during the time that the count was being made to specifically observe and measure the delay of all of the vehicles entering the intersection that had to stop to wait for a gap in traffic on MacArthur Boulevard in order to proceed. It was determined from that study that not everybody is stopped and delayed. In fact, there are sufficient gaps, particularly in the morning, so that people making a right turn do essentially “rolling stops.” They are not there long enough to even measure the delay. The analysis showed that in the morning, during the three hours of observation, only 36 percent of the right turns were delayed; the other 64 percent went on their way.

Although 80% percent of left turns were delayed during the morning peak period, the average delay for left turns, for those that were delayed, was only 18 seconds. The average delay for right turns, for those delayed, was 12 seconds. For all of the vehicles entering the intersection, the average delay in the morning, of those delayed, was 14 seconds. When those vehicles not delayed at all are counted in, the average delays for all vehicles is just under nine seconds for the morning peak period and 9½ seconds for the peak hour. Also, in the morning, the maximum queue observed by Mr. Petersen was 4 cars.

⁹ The observations were done on a Tuesday, in clear weather. A one-day observation is standard, and the data are considered typical by the County if collected on a Tuesday, Wednesday or Thursday.

These figures were then analyzed by Mr. Petersen using the Highway Capacity Manual published by the Transportation Research Board.¹⁰ The Highway Capacity Manual is a publication that specifically addresses the capacity of streets, highways, intersections and freeways. Applying its standards to the MacArthur/Walhonding intersection, the level of service grade for average delays of all vehicles in the morning peak period and the morning peak hour is an A level of service (*i.e.*, under 10 second delays on average). According to Mr. Petersen, you do not reach a failing condition until the average vehicle is delayed 50 or more seconds.

Mr. Petersen did the same kind of analysis for the evening peak period which is 4 to 7 p.m. and the evening peak hour. The average for all vehicles entering the intersection is 9 seconds for the entire evening peak period, which is a service level A. For the peak evening hour, the average delay is 11 seconds, which is level of service B. In the evening peak hour, the maximum queue observed was six vehicles.

Mr. Petersen concluded that the intersection is functioning well and that the proposed use would not change the average delay in any measurable fashion. Based on Technical Staff's evaluation and Mr. Petersen's expert analysis, the Hearing Examiner must reach the same conclusion.

There is one other public facility issue which should be mentioned, the question of whether the public parking lot directly across MacArthur Boulevard from the Sycamore Store should be used for occasional visitor overflow from Petitioner's business. This parking lot was briefly discussed on pages 10 and 11 of this report, where it was mentioned that it originally served the Sycamore Island Club, a private club located on Sycamore Island. It became a parking lot that served not only the trail to the C & O Canal, but also the Sycamore Store while it operated. 4/10/06 Tr. 227-229.

Mr. Winch testified that GEHCA was very concerned about the prospect of Petitioner's visitors parking in that lot, in the spots that are used by the community and by other visitors, to access

¹⁰ The Transportation Research Board is an arm of the National Academies of Science and Engineering, a national organization that collects research in numerous areas, including transportation.

the towpath and Sycamore Island. He stated that this lot was the neighborhood's only access to these recreational opportunities, which are some of the big attractions of the neighborhood. 11/4/05 Tr. 152.

Technical Staffer Dan Hardy testified that he does not have any knowledge of how the County addresses parking on the parking lot across MacArthur Boulevard from the subject site, but he understands the County operates it, and it is not signed or marked for any particular use. He does not know what its intended purpose is. 11/17/06 Tr. 58-59.

Mr. Brenneman researched the question and determined that the parking lot is under County jurisdiction, but there are no posted restrictions, and the County has apparently elected not to regulate its use. 11/17/06 Tr. 34-35. Norman Knopf, Esquire, opposition counsel, wrote to the County seeking clarification (Exhibit 148), and received a response (Exhibit 149) from Fred Lees, a manager in the Montgomery County Department of Public Works and Transportation (DPWT), which was not particularly helpful in resolving the uncertainty surrounding this parking lot.

Mr. Lees indicated his belief that the parking area was constructed for use by persons accessing the C & O Canal National Park, but he was "unable to find documentation to that effect." He noted that "the County does not post signs or regulate the use of public parking areas to specific patrons" due to enforceability issues. Although Mr. Lees added that DPWT "does not endorse" use of the parking area for "other than its intended purpose," his lack of certainty as to the "intended purpose" of the parking area in question, combined with the County's decision not to regulate the area, makes his statement regarding DPWT's lack of an endorsement an unsatisfactory basis upon which to impose a restriction upon Petitioner's use of the unrestricted parking lot.

The Hearing Examiner is somewhat torn on this issue. This unrestricted public lot seems like the ideal place to put occasional visitor overflow from Petitioner's on-site parking lot since it is not usually full during the business week (most of its activity being recreational weekend use) and since

it is probably a better alternative than having a visitor, who cannot fit into the on-site parking facility, park on Walhonding Road. On the other hand, much of the community is very concerned about having this public lot occupied by business vehicles crowding out their recreational use, and Petitioner has committed to making other arrangements for weekly staff meetings which create excess parking demands and to discouraging staff and visitors from using the public lot. Exhibit 166, pp. 7-8.

The Hearing Examiner concludes that the best resolution of this issue is to prohibit Petitioner from using the public lot for employees at any time and for visitors on weekends, but not to impose such a ban on occasional weekday visitors, as long as the County chooses not to post signs prohibiting the lot's use in this fashion. "Occasional" for this purpose would mean one or two cars, once or twice a week. Abuse of this restriction would be grounds for the Board modifying this condition or revoking the special exception.

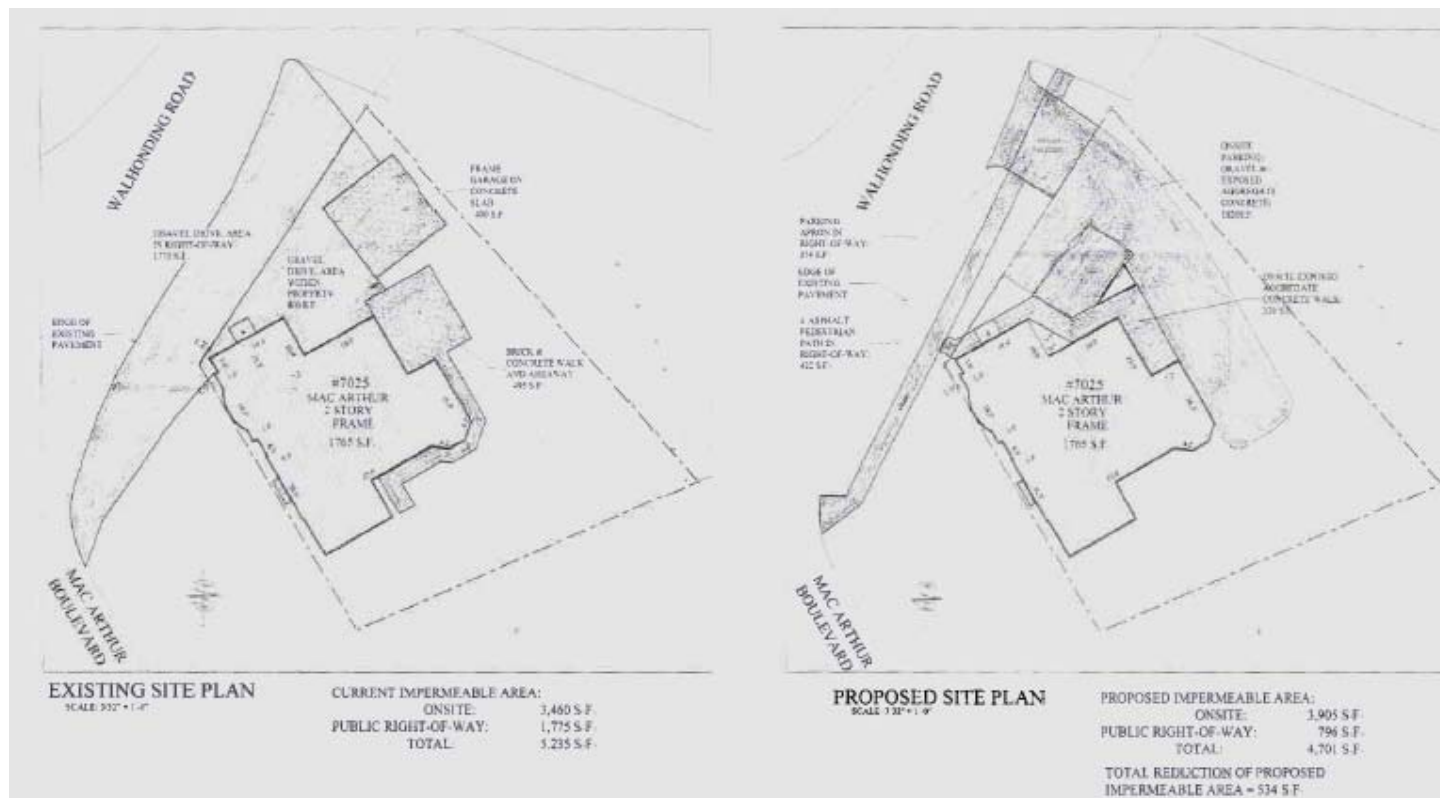
7. Environment:

The issue of whether the subject use will adversely impact the environmental beauty of the area was discussed above in Part II. B. of this report in conjunction with Master Plan compliance. The more prosaic environmental concerns of stormwater management and forest conservation are discussed below.

In a letter dated May 31, 2005 (Exhibit 100), the County Department of Permitting Services granted an exemption from stormwater management requirements for the site because the existing building was being retained and the amount of land disturbance was less than 5,000 square feet, which is the threshold that would trigger a stormwater management review. In the opinion of Petitioner's land use expert, Bill Landfair, the reconstruction of the property will not create a stormwater overflow onto adjacent properties. DPS also recommended that Petitioner use a porous

surface for paving material, which Petitioner will follow by using bluestone chip gravel on all the parking areas, except for the handicapped accessible space.

Exhibit 147 compares the impervious area of the existing site with the proposed impervious area on the revised site plan.



It shows that currently there is a total impervious area of 5,235 square feet, including both areas on site and in the public right-of-way which have been used as informal parking. The proposed plan would reduce to the combined impervious area of both to 4,701 square feet, which is a reduction of impermeable area of 534 square feet. Moreover, a significant portion of the planned impervious area is gravel and therefore will breathe and allow water through to the roots of the sycamore tree.

In a memo dated May 10, 2005 (Exhibit 101), the environmental staff at Park and Planning approved an exemption from the forest conservation law, noting that the property is not in a special protection area and there will be no clearing of existing forest. Although the form memo also recites

that the property is not subject to a Tree Save Plan, Technical Staff, the Planning Board and the Historic Preservation Commission all recommend that a Tree Save Plan be a condition of approval (Exhibits 23 and 71, and testimony of Michelle Oaks at 11/17/06 Tr. 83-89). This Tree Save Plan would focus on the 36-inch caliper sycamore tree located in the rear yard of the property.

According to the testimony of an arborist, Chris Cowles, the tree is in good shape and can be saved even if the parking facility is located right next to it. 11/17/06 Tr. 146-160. The sycamore is a very old, very fine specimen tree, and the arborist believes that it will last many years. It is part of the environmental setting for the property itself, and in fact has grown in line with the retaining wall and has broken a portion away.

The Hearing examiner recommends a condition requiring that this tree be protected as part of a Tree Save Plan. Its loss would not only detract from the natural beauty of the site, it would also remove a large portion of the required shading from the parking lot. The Hearing Examiner accepts Mr. Cowles unchallenged expert testimony that the sycamore tree can be saved even with the revised parking plan, and based on all the evidence of record, concludes that all environmental concerns will be appropriately managed on the subject site.

8. The Nature of the Work, Staffing and Hours of Operation:

As mentioned at the beginning of this report, Petitioner's proposed use is not a purely architectural firm, but rather the architectural and administrative portion of an "architect-build" firm. The legal impact of this fact will be addressed in Part II. E. of this report. This section will discuss the nature of the activities planned on the site, the expected staffing and the hours of operation.

Dean Brenneman is a licensed architect, whose main office would be located in the Sycamore Store, along with three other architects, two administrative employees and Peter Pagenstecher, a licensed builder who carries the primary Maryland Home Improvement Contractor's License for the firm. Mr. Pagenstecher is also the president, majority owner and managing partner of the

corporation. As such, he manages the books and the other financial and administrative aspects of the firm.

The firm is in the business of designing and remodeling residential structures, and has extensive experience in historic preservation. Mr. Brenneman testified that Mr. Pagenstecher is the only builder who would have an office on the premises, and by virtue of his responsibility for managing the construction projects, he is the one most likely to be out in the field away from the office. Mr. Pagenstecher spends less than a third of his time in the office now. He spends the majority of his time going between job sites, coordinating the work as the prime contractor.

Petitioner intends to maintain its current offices at 3700 Plyers Mill Road, Kensington, Maryland and 22960 Liberty Mills Road, Orange, Virginia, in addition to the Sycamore Store, and it intends to use the Kensington office for receipt of materials and staging of construction. Hence, there is little reason for field staff to come to the Sycamore Store office. According to Mr. Brenneman, the things that would be brought via truck to the Sycamore Store are the same things that would be brought via truck to the business if this were purely an architectural firm, such as the UPS and mail deliveries. The people who do the actual construction would not be appearing with trucks, either full of materials, or to get materials from the Sycamore Store. All of those staff are based in the field. They report directly to job sites in the morning; they leave from job sites at the end of the day; and they are encouraged not to come to the office because Petitioner wants them out doing billable work in the field. The building code will not allow use of the basement of the Sycamore Store for storage of either office things or building materials, because of fire code issues. Therefore, materials will not be stored on site.

In answer to the Hearing Examiner's question, "would you characterize your whole business as . . . an architecture firm," Mr. Brenneman responded that his business is a combination of things, an architectural component and an implementation component, which builds the work. The majority of

the work that happens in the physical offices is the architectural and administrative component of the business, which supports both parts of the operation. 5/12/06 Tr. 19. Mr. Brenneman does not believe it would be appropriate for there to be a condition prohibiting Mr. Pagenstecher from having an office at the Sycamore Store because part of his function is to act as the business manager for the architectural portion of the business.

Architectural and administrative operations would be housed in the Sycamore Store. The administrative staff at the Sycamore Store would handle bill keeping for both the architectural work and the construction work. Because of the nature of the work, architects visit job sites regularly, so they are often out of the office, and are rarely all in the office at the same time. Some of the architects might, at any given time, be driving a marked company vehicle, but the majority of parking on site will be staff in personal vehicles, not marked with any company signage. Mr. Brenneman assured that there would never be trucks parked on site evenings or weekends, and one of the recommended conditions so provides.

The office would generally function from about 8 in the morning till 5:30 at night, but flex time would be encouraged, so everybody would not be arriving and leaving at the same time. Primary office hours would be limited to 7:00 a.m. to 5:30 p.m., Monday through Friday. According to Mr. Brenneman, stacking six of the cars in the on-site parking facility is not a problem because the lot will rarely be full, and Sycamore Store will be a small office where everybody will be within shouting distance to move their cars. Also, the administrative staff come in first thing in the morning and stay through the end of the day, so there is no need to shuffle their cars.

Petitioner has agreed to the limits on staff, hours, visitors and operations recommended by the Planning Board (Exhibit 71). These restrictions, as set forth below, have been incorporated into the Hearing Examiner's recommended conditions in Part V of this report:

- The petitioner to limit the use to seven (7) employees.

- Primary hours of business operation from 7:00 a.m. to 5:30 p.m. daily, Monday through Friday. Extended Visitor hours until 7:00 p.m., Tuesday and Thursday evenings. Visitor and Staff Flex hours as noted below:
 - a. **Visitors**
 - i. No clients or other visitors allowed on weekends, or at any other time outside of Primary and Extended Visitor hours.
 - ii. Client visits limited to five (5) per week. Client visits to be logged and reserved for DPS inspection purposes.
 - iii. No company trucks or vans allowed visiting outside of the primary business hours (7:00 a.m. to 5:30 p.m. daily).
 - iv. No construction materials allowed to be delivered, received or stored at any time.
 - b. **Staff Flex hours**
 - i. Two (2) staff members, maximum, present between the hours of 5:30 a.m. to 7:00 a.m., Monday through Friday.
 - ii. Four (4) staff members, maximum, present between the hours of 5:30 p.m. to 7:00 p.m., Monday through Friday.
 - iii. Two (2) staff members, maximum, present between the hours of 7:00 p.m. to 9:00 p.m., Monday through Friday.
 - iv. Two (2) staff members, maximum, present between the hours of 10:00 a.m. to 4:00 p.m., Saturday and Sunday.
 - v. No staff members allowed at any other time outside of Primary and Flex Staff hours.

As stipulated in the Consolidated Statement of Operations (Exhibit 166), there is typically a lunch for company staff once a week on Wednesday. For that, Petitioner will arrange to park some cars elsewhere and to employ car pools. Similar arrangements would be made for any other meetings that exceed the parking capacity of the on-site parking facility.

Client comings and goings are in the order of about five clients per week. Some days there are no visits and on others there may be two, but there is not a high frequency of clients coming to the office. The vast majority of meetings with clients are at their homes or at showrooms, picking products. Subcontractors and other people stop by even less frequently.

The Hearing Examiner is satisfied that the restrictions on staff, hours, visitors and operations, along with other conditions proposed in Part V of this report, will adequately protect the community against any adverse effects from operational aspects of this use.

D. Community Response

There has been significant community reaction to the subject Petition. Numerous letters, for and against, have been received, including one signed by 57 community residents in support (Exhibit 44). Two surveys (*See* Exhibits 42, 59, 60, 60(a) and 60(b)) taken by the Glen Echo Heights Citizens Association (GEHCA), appear to show that a slim majority of the citizens of Glen Echo Heights opposes the subject proposal, and GEHCA testified in opposition through its officers, John Fenton (5/19/06 Tr. 78-85, 137-150) and Peter Winch (11/4/05 Tr. 142-183; 5/12/06 Tr. 88-105). A total of five opponents of the special exception (including Messrs. Fenton and Winch) testified against it at the hearing. On the other hand, 15 community members testified in support of the subject proposal, including the Mohican Hills Citizens Association (by Arrigo Mongini, President), representing 250 households, and the Mohican Swimming Pool Association (by Sylvia Reis, President). Among the supportive witnesses testifying on their own behalf, were Wayne Goldstein, President of the Montgomery County Civic Federation, and Harry Schwartz, former Director of Public Policy for the National Trust for Historic Preservation. The testimony of all the witnesses is summarized, individually, in Part III of this report.

The community is obviously divided, but it is important to bear in mind that the decision on a special exception application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Petitioner’s proposal against the specific criteria established by the Zoning Ordinance. The concerns, evidence and observations of both sides must be considered in that analysis, but the facts and the law ultimately determine whether a special exception should be granted. If an Applicant meets its burden justifying the grant of a special exception, the concerns of community members again come into play in determining conditions which may be fashioned to minimize the adverse impact of a special exception.

In this case, support for the proposal centers on the opportunity to preserve an historic landmark by repairing and restoring a dilapidated structure in the neighborhood. The supporters believe that Petitioner's firm can be operated without having significant adverse effects on the community, and they fear that if this opportunity is missed, the likely result will be the demolition of the present structure and the construction of a "mansion" in its place.

The People's Counsel supports granting the special exception in order to maintain the historical connection between the Sycamore Store and the surrounding stretch of MacArthur Boulevard. Mr. Klauber believes that the commercial relationship along MacArthur is much more significant than any relationship between the site and Glen Echo Heights, a neighborhood physically located at a different elevation. 5/19/06 Tr. 317-322.

Four governmental witnesses also testified regarding the petition (Michelle Oaks, Historic Preservation Office; Dan Janousek, M-NCPPC Technical Staff; David Niblock, Department of Permitting Services; and Dan Hardy, M-NCPPC Transportation Planning). Their testimony also militates in favor of granting the petition, especially the testimony of Ms. Oaks, who extolled the historical preservation virtues of this adaptive reuse.

The concerns of the Opposition fall into the following categories: over-commercialization; nonresidential views (especially of the parking facility); excessive traffic, potentially causing delays; possibly dangerous traffic emanating from the proposed on-site parking facility; and possible misuse of the public parking lot across MacArthur Boulevard, resulting in interference with community access to recreational areas. The Hearing Examiner has discussed all of these issues in previous sections of this report, and finds that, to the extent the opponent's concerns are supported in the evidence, they can be appropriately mitigated with conditions imposed by the Board. Traffic, parking, lighting, signage, operations, and the presence of commercial vehicles will all be controlled by conditions.

Perhaps the main fear is that the proposal for an architecture-build firm would over-commercialize this residential neighborhood. The opponents do not oppose the historical preservation, but they feel that the adaptive reuse would be more acceptable as a very small architectural office, or preferably a residence. The problem with their preference for alternatives is that there presently are no alternatives before the Hearing Examiner, who must evaluate what is before him, not what might have been.

Moreover, this site was historically commercial, as well as residential, and the Historic Preservation Commission has expressly recommended that this structure “continue to be used as a commercial building” Exhibits 30 and 140. Nevertheless, there is a public policy against over-commercializing residential neighborhoods, which is reflected in various parts of the Zoning Ordinance and in the Master Plan. In the present case, this policy must be analyzed in conjunction with the limits contained in the “professional, non-resident” special exception, which allows professional offices under specified circumstances, but not general offices. Whether Petitioner’s proposal falls into the former or the latter will be discussed in the next section of this report.

Opponent Norma Spiegel accurately quoted the admonition on page 31 of the Master Plan regarding special exceptions.

Of particular concern are office uses which should be discouraged and are better located in areas with commercial zoning such as the Bethesda CBD.

However, this provision must be read in conjunction with the Historic Preservation Act under which this structure will be preserved by an adaptive office use. The uncontradicted evidence from the experts in this case and from those knowledgeable in historic preservation (the HPC, Oaks, Goldstein and Schwartz) is that this is an appropriate adaptive reuse, and at this point, the only one available.

The concern expressed by Norma Spiegel and Ron Nessen that Petitioner’s proposal for use of the Sycamore Store will not fit in with the scenic neighborhood is, in some ways, beyond the scope of this inquiry. The Sycamore Store is already there, and Petitioner does not plan to fundamentally

change its structure. The HPC, the Council and the Planning Board have approved it as an historic site, establishing public policy that the structure be preserved. The Hearing Examiner finds that Petitioner's decision to move most of the proposed parking facility to the rear of the building and to add additional landscaping has largely eliminated the one scenic beauty concern that can be controlled in this venue.

E. Legal Issues

There are three controlling legal issues in this case:

1. Does MacArthur Boulevard satisfy the "highway" requirement of Section 59-G-2.38(c)(2)?
2. Does the Zoning Ordinance, when read in conjunction with the Historic Preservation Ordinance, permit the granting of a Special Exception, and allow the renovations and alterations planned on the subject site, absent a variance, even though the site does not, and will not, comply with some of the applicable zone's current development standards?
3. Does the proposed use (an "architect-build" firm) meet the definition of "members of a recognized profession" under Zoning Ordinance §§59-A-2.1 and 59-G-2.38?

1. MacArthur Boulevard and the "Highway Requirement":

The first issue to consider is whether MacArthur Boulevard satisfies the "highway" requirement of Section 59-G-2.38(c)(2) of the Zoning Ordinance. Section 59-G-2.38 offers three alternative locations where it is permissible to locate a nonresidential professional office.

The property must be:

- a) Located in a central business district that is designated as being suitable for the transit station-residential (TS-R) zone on an approved and adopted sector plan;*
- b) Designated as being suitable for nonresidential professional offices in the R-60 zone on an approved and adopted master or sector plan and is located along a major highway with an existing right-of-way width of no less than 90 feet or along a portion of an arterial road designated as a boundary of a central business district; or*
- (c) located in the R-90 zone and:*
 - (1) designated as historic in the Master Plan for Historic Preservation;*
 - (2) located along a highway with an existing right-of-way of at least 120 feet; and*
 - (3) contain a structure formerly used for nonresidential purposes.*

The property is not located in a central business district or in the R-60 Zone, so it does not meet either criterion “a” or criterion “b.” Therefore, it must meet locational criterion “c,” if it is to qualify for this special exception. Criterion “c” has three prongs, all of which must be satisfied. The subject site clearly satisfies the first and third prongs of criterion “c” because it has been designated as an historic site by the Master Plan for Historic Preservation (Exhibit 164), and it contains a structure that was used for nonresidential purposes (*i.e.*, the Sycamore Store).¹¹ Thus, the only question is whether it satisfies the second prong, which requires that it be located along a “highway” with at least a 120 foot right-of-way.

The undisputed evidence is that the MacArthur Boulevard right-of-way meets or exceeds the 120 foot statutory minimum. Petitioner’s traffic engineer, Stephen Peterson, testified that the right-of way met the width requirement. 5/19/06 Tr. 35. According to the testimony of William Landfair, Petitioner’s land use expert, MacArthur Boulevard has a right-of-way of varying widths. There is an existing right-of-way of at least 120 feet, and for the most part, the roadway is quite wide. In fact, “adjacent to the subject property, it's about 150 feet wide.” 5/19/06 Tr. 111. Technical Staff confirmed, in its report of October 20, 2005 (pp. 3 and 17), that the width of MacArthur Boulevard, adjacent to the subject site, is approximately 150 feet, and the Hearing Examiner so finds.

The only remaining issue is whether MacArthur Boulevard meets the definition of “highway” intended by the statute. The Opposition contends that it does not because, “A highway is generally understood to mean ‘a major road,...which has multiple lanes of traffic in each direction.’ . . . The narrow two-lane paved MacArthur Boulevard, having no curbs and gutters, hardly constitutes what is normally considered a ‘highway’.” Exhibit 56, p. 1.

¹¹ The Opposition suggests that the property might not qualify under the “nonresidential purposes” test because it was used simultaneously as a store and a residence, and most recently only as a residence (Exhibit 56, p. 2, note 1). The Hearing Examiner finds that the property’s undisputed use as a store for many years qualifies it under the “nonresidential purposes” test, even though the store’s owners lived in the structure while operating it as a store. The Zoning Ordinance does not provide that the past use must have been exclusively nonresidential; rather, it requires that the site “*contain a structure formerly used for nonresidential purposes.*” That is the case here. In fact, the Historic Preservation Commission clearly feels that the commercial use predominated because they seek to preserve its commercial history by the proposed adaptive reuse. Exhibits 30 and 140.

Resolution of this issue requires a determination of the Council's intent in using the word "highway" in this provision. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

We have stated the rules governing statutory construction so often that only the most cursory repetition is necessary. Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

In the subject case, the Zoning Ordinance itself does not define the word "highway," and the term is somewhat ambiguous, so we will have to resort to other indicia to determine what the Council intended by using the word "highway" in the Zoning Text Amendment (ZTA 05-01) that added that term to §59-G-2.38. The legislative history of ZTA 05-01, which was enacted by the Council as Ordinance No. 15-48, effective May 2, 2005, is in the record as Exhibit 115.

That legislative history reveals that the potential restoration of the Sycamore Store was the driving force behind the Zoning Text Amendment. The first bullet point on page 2 of the February 18, 2005, Technical Staff report regarding ZTA 05-01 states directly, "The proposed zoning text amendment was initiated by Councilmember Denis to provide an opportunity to preserve 'the Sycamore Store' . . . and any other historically designated property that fits the parameters as stated above." A similar statement is contained on the first page of the Planning Board's March 3, 2005, memorandum to the Council recommending approval of the ZTA. The February 17, 2005, memorandum of M-NCPPC's Historic Preservation Supervisor, regarding ZTA 05-01, noted that the proposed ZTA would potentially affect a very small number of properties in the County, but "it would allow for the adaptive reuse of one very important structure: the Sycamore Store on MacArthur

Boulevard.” The testimony at the March 8, 2005 Council Hearing on ZTA 05-01 was addressed mainly to the Sycamore Store situation, with support provided by the Mohican Hills Citizens Association and opposition provided by the Glen Echo Heights Citizens Association, the very organizations “at loggerheads” in the subject case. Finally, the April 7, 2005, memorandum from the Council’s Senior Legislative Analyst to the Council regarding ZTA 05-01 emphasized that “[t]he ZTA is seen as an important step in the preservation of the Sycamore Store and other similarly situated buildings that otherwise may fall into disrepair.”

Given this legislative history, it would have made no sense for the Council to have enacted the ZTA 05-01 if they intended to preclude the Sycamore Store’s eligibility by defining the word “highway” so as to not include MacArthur Boulevard. The Council’s clear intent was to make it possible for the Sycamore Store and similarly situated sites to be preserved by allowing a professional office to be established on the site, assuming it conformed to other criteria posed by Zoning Ordinance §59-G-2.38. The Opinion accompanying Ordinance 15-48 referred to “a road with a 120-foot right-of-way,” rather than a “highway” with a 120-foot right-of-way, suggesting that the Council was considering the width of the right-of-way, not whether it was denominated a “highway” in a formal sense. It is undisputed that MacArthur Boulevard meets the width requirements, as discussed above.

In addition to this legislative history, the Hearing Examiner notes that Technical Staff expressed its opinion “that MacArthur Boulevard, an arterial road, satisfies the highway requirement of Section 59-G-2.83.” Exhibit 67, p. 4. Technical Staff’s opinion was based, in part, upon the fact that the *Bethesda/Chevy Chase Master Plan* classifies MacArthur Boulevard as an “arterial road,” and makes reference to it several times (pp. 119 and 123) as a “highway” in discussing various “Highway Needs.”

Finally, Mr. Petersen opined that MacArthur Boulevard is a highway for purposes of this special exception because it is a public way for purposes of travel by vehicular travel. He read a

definition of highway included in the 2003 edition of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), a copy of which is in the record as Exhibit 117(a). Quoting from the definition of words and phrases in that manual, a highway is defined as “a general term for denoting a public way for purposes of travel by vehicular travel, including the entire area within the right-of-way.” 5/19/06 Tr. 28-29. This definition would clearly include MacArthur Boulevard.

Based on this record, the Hearing Examiner concludes that MacArthur Boulevard meets the statutory meaning of the word “highway,” as it is used in Zoning Ordinance §59-G-2.38. That was the intent of the Council in using the word, and that is the meaning accepted by the applicable Master Plan and the MUTCD.

2. Zoning, Historic Preservation, Development Standards and Renovations:

The next legal issue we must address is whether the Zoning Ordinance, when read in conjunction with the Historic Resources Preservation Ordinance, permits the granting of a Special Exception, and allows the renovations and alterations planned on the subject site, absent a variance, even though the site does not, and will not, comply with some of the applicable zone’s current development standards. To answer this complicated question, we must first look to the history of Sycamore Store, as it is summarized in Part II. A. of this report.

The lot was originally platted in 1889; however, the current subject site was created as “Part of Lot 32” by deed recorded on November 5, 1953. (Exhibit 85). The main structure is variously described as being constructed in 1916 or 1919 (*i.e.*, in either case, prior to the first Zoning Ordinance, which was enacted in 1928), and a store was operating on the property in 1919. The building was enlarged sometime in 1925 (still prior to the first Zoning Ordinance) which brought the structure to within two feet of the property lines on both MacArthur (1.9 foot setback) and Walhonding (1.2 foot setback). 4/10/06 Tr. 254-256. These 1925 improvements are also responsible for the current front

elevation of the structure and the historical configuration of the building. Unfortunately, the buildings setbacks do not conform to any the Zoning Ordinance subsequently enacted by the County.

Because the Sycamore Store was constructed and renovated into its current configuration prior to the enactment of any Zoning Ordinance, it is, at least,¹² a lawful, nonconforming structure, as defined in Zoning Ordinance §59-A-2.1:

A building or structure that was lawful when constructed and continues to be lawful, even though it no longer conforms to the requirements of the zone in which it is located because of the adoption or amendment of the zoning ordinance or the zoning map.

This fact alone, however, does not answer the question of whether a special exception may be granted without conforming to the current standards of the applicable R-90 Zone, which call for setbacks of 30 feet from the street (subject to an Established Building Line); 25 feet in the rear; and 8 feet on either side, with a combined side setback minimum of 25 feet.¹³

Zoning Ordinance §59-G-1.23 provides that “Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.” That is the general rule which would apply here, if not varied by some other statutory provision. The other statutory provisions which must be considered in this connection are Zoning Ordinance §59-G-4.12 regarding nonconforming structures, Zoning Ordinance §59-B-5.3, regarding single-family residential structures on lots recorded prior to June 1, 1958, and the Historic Resources Preservation Ordinance, codified in Chapter 24A of the Montgomery County Code.

Zoning Ordinance §59-G-4.12:

We first look at the language of Zoning Ordinance §59-G-4.12, to determine whether it permits alteration of the structure without conforming it to the current development standards of the

¹² The modifier “at least” is used because, depending on one’s interpretation of Zoning Ordinance §59-B-5.3, the structure may not even be considered “nonconforming.” This issue will be discussed below. The point here is that the structure, if considered nonconforming, is lawfully so.

¹³ Exceptions are allowed in some cases for historic sites, which will be discussed below.

zone. The only alterations planned here will not expand the structure's footprint, nor increase the state of nonconformance with current setback standards.¹⁴

Zoning Ordinance §59-G-4.12 provides:

Except as otherwise provided in this Chapter, a nonconforming building or structure may be altered, renovated, or enlarged only if the construction will conform the building or structure to the requirements for the zone in effect when construction begins.

While this language appears to require conformance with current standards when a nonconforming structure is *altered, renovated, or enlarged*, the Department of Permitting Services (DPS) has a different interpretation of Zoning Ordinance §59-G-4.12. DPS Permitting Services Specialist David Niblock testified that DPS does not require an owner, who is altering his structure, to bring his entire structure into conformity with applicable setbacks, as long as the alteration, renovation or enlargement is “not making a nonconforming situation any worse.” 4/10/06 Tr. 71-72, 95.

Not surprisingly, this position was supported by Petitioner (Exhibit 54) and disputed by the Opposition (Exhibit 56, p. 3; Exhibit 165, p. 7). The Petitioner argues that the title of Zoning Ordinance §59-G-4.12 is “Structural alterations,” and the renovations planned here do not involve alterations to the structural elements of the building. Petitioner also notes that it has been the long-standing practice of DPS to interpret this provision as not requiring a variance as long as the planned renovations do not expand the existing nonconformity of a nonconforming structure. The Opposition argues that the statute should be interpreted in accordance with the plain meaning of its language, which would not permit a nonconforming building or structure to be “altered, renovated, or enlarged” unless the construction will “conform the building or structure to the requirements for the zone in effect when construction begins.” They note that although the plans may not call for enlarging the

¹⁴ The only exterior changes to the main structure are to enclose the screened-in porch and to install an exterior stairway to the existing balcony, for fire code compliance. 4/10/06 Tr. 267. The enclosure of the already screened-in porch, which Michelle Oaks of the Historic Preservation Office described as “glass[ing] in” the screened porch (4/10/06 Tr. 34), does not change the building's footprint because the previous screening in of the porch rendered it an addition, which established the footprint. 4/10/06 Tr. 98-99. Exterior stairways are permitted as exemptions to setback requirements pursuant to Zoning Ordinance §59-B-3.1.

building, they do call for it to be altered and renovated, thus bringing Petitioner's planned activity within the ostensible meaning of the provision.¹⁵

Because the interpretation of Zoning Ordinance §59-G-4.12 could have broad impact upon property owners in the County, the Hearing Examiner referred the question of the proper interpretation of this provision to the County Attorney (Exhibit 136). The Hearing Examiner takes official notice of the County Attorney's memorandum dated February 12, 2007, and filed herein on February 13, 2007 as Exhibit 159. The County Attorney's opinion is that this provision applies only to nonconforming structures "used in connection with a nonconforming use." The County Attorney bases this conclusion on the language in the introduction to §59-G-4.12 (Exhibit 159, pp. 3-4). That introductory language, in §59-G-4.1, provides that "[a] *nonconforming use may be continued, subject to the following limits,*" and one of those limits is the one specified in §59-G-4.12 and quoted above. Under this reading of the statutory scheme, §59-G-4.12 does not apply here because this case involves a nonconforming structure, but not a nonconforming use. The last use of this property was as a residence, and the proposed use would be permitted by special exception, if one is granted.

Petitioner did not respond to the County Attorney's memorandum, but the Opposition did, taking issue with the County Attorney's conclusion that there must be a nonconforming use for §59-G-4.12 to apply. Exhibit 165, pp. 4-7. The Opposition argues that the legislative history (attached to Exhibit 165) makes clear that the Council intended to distinguish between nonconforming structures and nonconforming uses, a distinction which the Opposition claims the County Attorney is blurring.

The Hearing Examiner agrees with the Opposition that the Council intended to distinguish between nonconforming structures and nonconforming uses; however, the Opposition incorrectly characterized the County Attorney's position as stating that "§59-G-4.12 applies solely to nonconforming uses rather than buildings." Opposition Exhibit 165, p. 5 (Emphasis in original.). What the County Attorney said was that for §59-G-4.12 to apply, you had to have both a nonconforming

¹⁵ The intended meaning of the words "altered, renovated, or enlarged" will be discussed later in this section.

use and a nonconforming structure, as explained above. Exhibit 159, pp. 3-4. The Hearing Examiner finds that the County Attorney is persuasive on this point since §59-G-4.12 and other subsections are subject to the introductory language, of §59-G-4.1, which provides that “[a] *nonconforming use may be continued, subject to the following limits,*” one of which is the limit specified in §59-G-4.12. The result of this analysis is that Zoning Ordinance §59-G-4.12 does not apply to the subject case.

Zoning Ordinance §59-B-5.3:

Since §59-G-4.12 does not apply here, we now examine Zoning Ordinance §59-B-5.3, which provides:

Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded, except that:

(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;

(b) one-family dwellings and accessory structures on a lot legally recorded by deed or subdivision plat before June 1, 1958, in the Upper Montgomery County Planning District must comply with the setback, yard, and area coverage standards applicable to the lot in the 1956 Zoning Ordinances for the Upper Montgomery Planning District;

(c) the maximum building height and maximum building coverage in effect when the building is altered, renovated, or enlarged, applies to the building; and

(d) an established building line setback must conform to the standards for determining the established building line in effect for the lot when any alteration, renovation, or enlargement occurs. Any building permit issued before November 23, 1997 must conform to the development standards in effect when the lot was recorded.

The County Attorney concluded (Exhibit 159, p. 3), and the Opposition agreed (Exhibit 165, p. 5) that Zoning Ordinance §59-B-5.3 does not apply to this case because the intended use is a non-resident professional office, and not a residential use. The County Attorney opined that “it is not

logical to extend this exemption [contained in §59-B-5.3] to structures like those in the instant special exceptions cases that will no longer be used as dwelling units.” Exhibit 159, p. 3.

The Hearing Examiner does not completely agree with the County Attorney’s analysis. Although it is sensible, as the County Attorney suggests, not to apply the §59-B-5.3 exemption to former dwelling units being replaced with purely commercial structures, that is not what happens under the special exception sought here (Section 59-G-2.38, “Offices, professional, nonresidential”). The penultimate sentence of that Section provides that “*The Board may allow for . . . the exterior of the premises to be changed, altered or modified provided the single-family character and the basic residential appearance of the building are retained.*” [Emphasis added.] Thus, the structure itself must retain its residential and single-family character, and the rationale for the §59-B-5.3 exemption would still apply. If the professional use is discontinued in the future, the structure could still be used as a residence.

The Board of Appeals recently had occasion to consider this issue in S-2673, the *Petition of Leizer Z. Goldsmith* for the same type of special exception sought here, a nonresident professional office. The County Attorney simultaneously evaluated both the subject case and the *Goldsmith* case in reaching his conclusion that §59-B-5.3 did not apply, and his memorandum was before the Board when it considered the *Goldsmith* case. Nevertheless, the Board adopted the Hearing Examiner’s analysis on this issue, as set forth above, expressly stating, “The Board concurs with the Hearing Examiner that Section 59-B-5.3 of the Zoning Ordinance applies to the structure in question . . .,” even though its intended use was for a nonresident professional office. *Opinion of the Board, effective April 19, 2007*. The Hearing Examiner thus concludes, contrary to the County Attorney’s position, that §59-B-5.3 is not rendered inapplicable to the subject case merely because a nonresident professional office is the intended use, pursuant to §59-G-2.38. The structure itself (as distinguished from its use) will

retain its residential and single-family character because the only external changes to it will be restorative.

The next step is to determine what impact §59-B-5.3 has on this case. The Sycamore Store structure is covered by the language of the first sentence in the section because it is a “*one-family dwelling in a residential zone . . . that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958 . . .*” Under the second part of the first sentence, it is therefore not considered “a nonconforming building.” As a result, under the second sentence, it “*may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded . . . [with certain exceptions].*”¹⁶

Although part of the lot in this case was originally platted in 1889, the current subject site was created as “Part of Lot 32” by deed recorded on November 5, 1953. (Exhibit 85). Thus, the zoning ordinance in effect on that date, the 1950 Zoning Ordinance, would establish the applicable development standards,¹⁷ if the dwelling were to be “altered, renovated or enlarged, or replaced” in a manner intended to be covered by those words. We now turn to the meaning intended by the words, “altered, renovated or enlarged.”

The Opposition argues, both in the context of Zoning Ordinance §59-G-4.12 (Exhibit 56, p. 3; Exhibit 165, p. 7), and in the context of §59-B-5.3 (Exhibit 130, pp. 4-5 and attached legal memo of August 14, 2006), that the plain meaning of the words “altered, renovated, or enlarged” is clear and unambiguous, and therefore must be given effect as written. In support, they cite *Canaj, Inc. v. Baker*

¹⁶ Exceptions “a” and “b” to §59-B-5.3 are inapplicable because the current lot was not recorded before March 16, 1928, and it was not in the Upper Montgomery County Planning District. Exceptions “c” and “d” to §59-B-5.3 would apply the current height, building coverage and established building line setbacks in effect if and when the building is altered, renovated or enlarged. Because both these exceptions depend on the meaning of the words “altered, renovated, or enlarged,” in the same way that the effect of the main part of §59-B-5.3 depends on the meaning of those words, there is no need to discuss these exceptions separately. The meaning of those words is discussed in the main text, above.

¹⁷ The development standards in the 1950 Zoning Ordinance for the applicable “A” Residence Zone are found in Section 176-3. In general, it calls for setbacks in the front yard of 25 feet, in the side yard of 7 feet and in rear yard of not less than 15 feet, with an average depth of 20 feet. Where there is an established building line, the front yard setback must comply with it, up to a maximum of 40 feet, but the buildable width of a corner lot may not be reduced to less than 22 feet.

and Division Phase III, 391 Md. 374, 893 A.2d 1067, 1084 (2006) and *Osbourne v. Walzer*, 167 Md. App. 460, 893 A.2d 654, 656-57 (2006) (quoting from *Jones v. State*, 336 Md. 255, 261, 647 A.2d 1204 (1994)).

The tenet of statutory construction which underpins the Opposition's argument is unassailable – when legislative intent is clear from the language of the statute, giving that language its plain and ordinary meaning, effect must be given to the statute as written. The Hearing Examiner cited the case of *Trembow v. Schonfeld, supra*, for the same proposition. However, as noted by the Court of Appeals in *Trembow*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006), “If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent.” Once again, this is such a case.

Here the ambiguity is not necessarily inherent in the words used, but there is an ambiguity when those words are applied in the context of a zoning ordinance, as distinguished from a building or housing code. Generally speaking, with regard to the regulation of structures, it is the outside of a structure that zoning ordinances address, not the inside. *See, e.g. Chevy Chase View v. Rothman*, 323 Md. 674, 686-687, 594 A.2d 1131 (1991). Thus, when a zoning ordinance uses the terms “alter, renovate or enlarge,” the Council may well have been trying to discuss changes to the outside of the structure, not those on the inside. In this context, it is permissible to examine “other indicia” to determine how these words were meant to be applied in zoning regulations that govern changes to structures.

One of those indicia is the interpretation of the Zoning Ordinance by the agency that generally applies it, in this case, the Department of Permitting Services. It is a maxim of statutory construction that an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight. As stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), “We must

respect the expertise of the agency and accord deference to its interpretation of a statute that it administers.”

As discussed above, David Niblock of DPS made it clear in his testimony that his agency was not concerned, from a zoning compliance standpoint, with alterations or renovations that do not change the footprint of the structure or worsen any nonconformity. A similar position is taken by DPS regarding Established Building Lines, as set forth in a “Code Interpretation/Policy” publication entered into this record as Attachment 2 to the March 20, 2006 Technical Staff report (Exhibit 67). In this publication, DPS states:

The established building line is required in the R-60, R-90 . . . zones . . . for:

1. All new construction of houses and main buildings
2. All proposed additions that extend beyond the front of the building.

In other words, with regard to established building lines, DPS is not concerned about alterations or renovations that do not change the structure’s front building line. The Opposition argues that this interpretation ignores the words “alteration” and “renovation” and undercuts the public policy of gradually extinguishing nonconforming structures. At first, the Hearing Examiner shared that opinion, but upon reflection, DPS’s view appears to be a sensible interpretation of the statute. DPS is not reading the words “altered or renovated” out of the statute; rather, it is interpreting them as referencing the only kind of structural change that matters in a zoning context, external change. To read the statute as the Opposition does, would prevent homeowners across the County, who happen to live in nonconforming homes, or “not nonconforming” homes pursuant to §59-B-5.3, from performing small, internal renovations to their homes that have no impact upon their neighbors. In the words of Mr. Niblock, it would be an “undue hardship” to require a variance to do renovations within the already existing footprint. 4/10/06 Tr. 70. It is hard to believe that the Council intended that result in using the words “altered or renovated.”

The County Attorney looked at this issue and opined (Exhibit 159, p. 2):

We believe that Mr. Niblock from DPS correctly stated the applicable law: there being no applicable exception, the alteration must comply with currently applicable standards and must not increase the degree of nonconformity – i.e. make “a nonconforming situation any worse.” By the same token, we have found no statutory requirement that provides that internal changes to a structure or addition that does not comply with current development standards trigger a requirement that the entire structure be made to comply with current development standards other than when a nonconforming use is to be continued (section 59-G-4.12).

Later in his memorandum, the County Attorney stated (Exhibit 159, p. 4.):

Because the development standards regulate the exterior dimensions of the structure, any change to the exterior of such a nonconforming building or structure must comply with the currently applicable development standards, and cannot increase the extent of the nonconformity.

In sum, the Hearing Examiner concludes that DPS’s interpretation of the words “altered or renovated” is the correct one, at least insofar as renovations or alterations that neither change the footprint nor enlarge any nonconformity, and that the Sycamore Store, which is not being enlarged, nor worsening any nonconformity, may be renovated without obtaining a variance. This conclusion seems especially appropriate where, as here, the present footprint of the structure in question predated any zoning ordinance. Nevertheless, the Board need not decide this difficult issue of statutory interpretation to resolve this case. Even if the Board were to disagree with the Hearing Examiner’s interpretation of §§59-G-4.12 and 59-B-5.3,¹⁸ the subject property’s historic designation would require the same result for this rather unique site, for the reasons discussed below.

The Historic Resources Preservation Ordinance:

The Historic Resources Preservation Ordinance is codified in Chapter 24A of the Montgomery County Code. The purpose of the law is set forth in Section 24A-1:

It is the purpose of this chapter to provide for the identification, designation and regulation, for purposes of protection, preservation and continued use and enhancement, of those sites, structures with their appurtenances and environmental

¹⁸ The language of §59-B-5.3 is also open to interpretation in another regard. When it states that a structure “is not a nonconforming building,” does that mean it is the same as a “conforming building”? The Hearing Examiner believes that is what was intended, because otherwise the property owner might well be in worse shape than the owner of a lawful nonconforming structure, a status which conveys certain rights upon the owner. As the owner of a conforming structure (or a not-nonconforming structure), one can presumably obtain a special exception without changing the structure to conform to current development standards, except as otherwise spelled out in §59-B-5.3.

settings, and districts of historical, archeological, architectural or cultural value in that portion of the county which is within the Maryland-Washington Regional District. Its further purpose is to preserve and enhance the quality of life in the county, safeguard the historical and cultural heritage of the county, strengthen the local economy, stabilize and improve property values in and around such historical areas, foster civic beauty and to preserve continued utilization and pleasure of the citizens of the county, the state, and the United States of America.

To carry out this purpose, the Ordinance established the *Master Plan for Historic Preservation* in Section 24A-3(a), which provides:

As part of the general plan for the physical development of that portion of the county within the Maryland-Washington Regional District, there shall be prepared, adopted and approved a master plan for historic preservation which shall constitute an amendment to the general plan for the Maryland-Washington Regional District. Such plan shall designate historic sites and historic districts and describe their boundaries; it shall propose means for the integration of historic preservation into the planning process; and it shall suggest other measures to advance the goals of historic preservation.

The law also created the Historic Preservation Commission (HPC) in Section 24A-4, and enumerated its powers in Section 24A-5. Among other things, the HPC given the power, in Section 24A-5(c), to act upon applications for historic area work permits.

Section 24A-6(a)(1) specifies that “[a]n historic area work permit for work on public or private property containing an historic resource must be issued pursuant to the provisions of this chapter before . . . [c]onstructing, reconstructing, moving, relocating, demolishing or in any manner modifying, changing or altering the exterior features of any historic site”

Pursuant to this statutory scheme, the subject site has been designated as an historic site and added to the *Master Plan for Historic Preservation*. Exhibit 164. As such, the Council, the Planning Board and the HPC have all clearly expressed their intent that it be preserved. The HPC and the Planning Board have determined that the site should be preserved through the adaptive reuse proposed by Petitioner in this case. See Exhibits 30, 37, 71 and 140. For this adaptive reuse to proceed, a special exception is required. The Opposition’s theories would prevent this adaptive reuse because, if they are correct, renovating the property would require compliance with setbacks far in

excess of those that currently exist.

In fact, the Opposition's interpretation of the Zoning Ordinance would effectively prevent the historic preservation of the Sycamore Store for any use, including a residential use. Under their theory, the Sycamore Store is a lawful nonconforming structure, not exempted by §59-B-5.3, and subject to the requirements of §59-G-4.12. That provision requires that a nonconforming structure be brought into compliance with current development standards when it is "altered, renovated or enlarged." The evidence in this case is uncontradicted that any reuse of this dilapidated structure would require substantial renovations. Since the Opposition interprets the words "altered, renovated or enlarged" to include virtually all renovations, their interpretation of §59-G-4.12 would require the renovation of the Sycamore Store to conform the entire building to the current development standards, whether or not the renovation was for a special exception or for a permitted use, such as a residence. Those current development standards would not permit the present front yard setbacks of 1.9 and 1.2 feet. In effect, the historic structure would have to be torn down to be used again. Thus, even if we assume, *arguendo*, that the Opposition's interpretation of the Zoning Ordinance is correct in general, its application to this case would bring the Zoning Ordinance into conflict with the Historic Resources Preservation Ordinance.

In order to avoid a conflict between two statutory schemes, the courts have held that an attempt to harmonize them must be made. In *Maryland-National Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 183, 909 A.2d 694, 700 (2006), the Maryland Court of Appeals held:

"[w]here statutes relate to the same subject matter, and are not inconsistent with each other, they should be construed together and harmonized where consistent with their general object and scope." *Gwin v. Motor Vehicle Admin.*, 385 Md. 440, 462, 869 A.2d 822, 834 (2005) [***13] (citations omitted); *State v. Ghajari*, 346 Md. 101, 115, 695 A.2d 143, 149 (1997). Therefore, "when two statutes appear to apply to the same situation, this Court will attempt to give effect to both statutes to the extent that they are reconcilable." *Ghajari*, 346 Md. at 115, 695 A.2d at 149 (citations omitted); *Mayor of Oakland v. Mayor of Mountain Lake Park*, 392 Md. 301, 316-17, 896 A.2d 1036, 1045 (2006).

The Zoning Ordinance itself recognizes the need to allow for compliance with the Historic Resources Preservation Ordinance. Zoning Ordinance §59-C-1.323, the section which specifies the setback requirements for a main building in the R-90 Zone, has a footnote 7, which provides:

The minimum lot width at the building line and yard requirements for a main building or an accessory building or structure may be reduced when the lot is located in an historic district in accordance with the provisions of Sec. 59-A-6.23.

The referenced section, §59-A-6.23, discusses lot width and setbacks in historic districts:

In a historic district designated on the Master Plan for Historic Preservation the minimum lot width at the building line and setback requirements for a main building and for an accessory building or structure as set forth in Article 59-C may be reduced by the Planning Board in the course of site plan review under Division 59-D-3, as long as the reduction is also approved by the Historic Preservation Commission through the Historic Area Work Permit process (Chapter 24A-7). Such reductions in lot widths and setbacks must serve the purpose of maintaining the historic development and building patterns as evidenced throughout the surrounding designated historic district.

Although the subject site is not located in an historic district, it is an individual historic site, and the rationale behind footnote 7 and Section 59-A-6.23 applies with equal force, as evidenced by Section 59-A-6.2, the lead-in to §59-A-6.2 3. Section 59-A-6.2 provides:

Purpose. The purpose of this section is to provide additional flexibility in the treatment of individual historic sites and historic properties in historic district which are designated on the Master Plan for Historic Preservation. The focus is on providing incentives for individual owners to renovate existing historic structures and to make these properties economically viable in a way which contributes to and does not detract from the overall historic character of sites and districts designated in the Master Plan for Historic Preservation. [Emphasis supplied.]

It is evident that the Council intended for the two statutes to be read together in a way that makes sense out of both of them. It makes no sense to interpret the Zoning Ordinance as requiring destruction of a portion of a historic structure in the process of restoration for adaptive reuse, just to bring it into compliance with otherwise applicable setback requirements. The Hearing Examiner

finds that the Council never intended such a consequence,¹⁹ and the Zoning Ordinance should not be construed so as to prevent an adaptive reuse under the Historic Resources Preservation Ordinance.

3. The Meaning of Professional Office under Zoning Ordinance §§59-A-2.1 and 59-G-2.38:

The final legal issue which must be addressed is whether the proposed use (an “architect-build” firm) meets the definition of “members of a recognized profession” under Zoning Ordinance §§59-A-2.1 and 59-G-2.38.

Section 59-A-2.1 defines “Office, professional, nonresidential” as:

*An existing single-family structure used for professional office purposes by any member or **members of a recognized profession, such as, but not limited to,** doctors, lawyers, **architects**, accountants, engineers and veterinarians, but not including medical, dental or veterinarian clinics or inpatient treatment facilities. Professional offices do not include general business offices, such as the offices of insurance companies, trade associations, manufacturing companies, investment concerns, banks or real estate companies. [Emphasis added.]*

Similarly, §59-G-2.38, the provision under which the instant special exception is sought, specifies that,

*An existing single-family structure may be used for professional office purposes by any member or **members of a recognized profession, such as a doctor, lawyer, architect**, accountant, engineer, veterinarian, but not including the following:*

- (a) a medical, dental or veterinarian clinic*
- (b) an in-patient treatment facility*
- (c) a general business office, such as an insurance company office, a trade association, a manufacturing company, an investment company, a bank or a real estate company. [Emphasis added.]*

Both sections list some of the individuals and entities the Zoning Ordinance considers to be members of a profession and some of those it does not. Because architects are listed, it is clear from this language that an ordinary architectural firm would be permissible under these provisions. The language of Section 59-A-2.1, however, clearly indicates that the list is not exclusive, since it specifies that members of a recognized profession are “not limited to” those listed. Thus, the first question is

¹⁹ Further evidence of this point is contained in the penultimate sentence of Zoning Ordinance §59-G-2.38, which authorizes the Board to allow exterior changes to a buildings subject to a petition for a nonresidential, professional office special exception, but not for “a building designated as historic in the Master Plan of Historic Preservation . . .” Any changes to an historic structure requires an historic area work permit, a condition recommended by the Hearing Examiner.

whether a “builder” (which the Hearing Examiner takes to mean, a construction contractor) qualifies as a professional under these sections.

The County Attorney (Exhibit 159, p. 5) and the Opposition (Exhibit 165, p. 2) point out that the Office of the County Attorney long ago opined “that a building contracting business did not constitute a ‘professional use’ within the meaning of the Zoning Ordinance.” (Exhibit 159, p. 5, citing County Attorney Opinion No. 73.057 of April 4, 1973). Though Opposing Counsel goes to some length to set forth the characteristics identifying a professional (Exhibit 56, pp. 4-5 and Exhibit 130, pp. 2-4), the Hearing Examiner finds it unnecessary to analyze this part of the issue any further because even the Petitioner concedes that a construction contractor, and in particular Peter Pagenstecher, is not a professional under the Zoning Ordinance. In Part V of the December 15, 2005 filing by Petitioner’s attorney (Exhibit 54), Mr. Kline states, “The only periodic occupant of the building who is not a ‘professional’ (under the County’s definition) is Peter Pagenstecher, a principal of Brenneman & Pagenstecher who oversees the design and construction estimating functions of the company, as well as monitors construction activities in the field.”

We therefore turn to the more difficult question of whether the construction contractor (*i.e.*, nonprofessional) part of Petitioner’s business can be permitted at the site under this special exception as an accessory use.²⁰ An “accessory use” is expressly permitted in the R-90 Zone pursuant to Zoning Ordinance §59-C-1.13(g). An accessory use is defined in Zoning Ordinance §59-A-2.1, as:

A use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building, and (2) located on the same lot as the principal use or building.

Both the County Attorney and the Opposition cite the case of *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 587 A.2d 1205 (1991), as instructive on the meaning of the

²⁰ The Hearing Examiner agrees with the County Attorney’s observation (Exhibit 159, p. 5) that ownership of the business is immaterial, since it is the use, and not the ownership, that is regulated by the Zoning Ordinance. See *Anderson v. Associated Professors of Loyola College*, 39 Md.App. 345, 349, 385 A. 2d 1203, 1204-1205 (1978). It follows that the type of work in which the firm engages at other locations would be similarly irrelevant to the special exception analysis of this use at this location. Thus, the discussion will address only the issue of the use at the subject site.

language, “customarily incidental and subordinate to the principal use.” In *Zent*, the lawful use on the site was a milk trucking and distribution business. Carroll County challenged the owner’s practice of storing decommissioned vehicles on the site as a source of parts for the operable trucks, claiming it was unlawfully operating a junkyard on the site. The owner defended, *inter alia*, on the grounds that the storage of the decommissioned vehicles on site was an “accessory use.” Finding “a paucity of Maryland cases defining accessory uses, incidental uses, and their *relationship* with legal primary uses,” *Id. at 759*, the *Zent* court surveyed cases throughout the nation on the meaning of the term “accessory use.” Ultimately, the court held that the storage of the decommissioned trucks,

was attendant, concomitant, and customary to the primary use of the property. It was thus incidental to, or accessory to, the primary nonconforming use. We hold that when a use does not change the basic nature of the primary permitted nonconforming use and is truly incidental to, and supports the nonconforming use, it is an accessory use and, unless expressly prohibited by statute, is permitted. [*Id.* 86 Md. App. At 768-769, 587 A.2d at 1217]

It should be noted that *Zent* was decided under a different zoning ordinance (Carroll County’s), and our Zoning Ordinance actually defines “accessory use,” as quoted on the preceding page. Nevertheless, the concept the court analyzed (*i.e.*, the meaning of “customarily incidental” and “subordinate to the principal use”) is the same as that used in our Zoning Ordinance, so the holding in *Zent* is helpful.

In the subject case, the Hearing Examiner finds that, in addition to the primary use of an architect’s office, Petitioner is seeking to establish two other uses on the site, a minimal construction contractor use (“minimal” because most of the construction contract business will be conducted at other sites) and an administrative support use for the overall business.

Petitioner states that it “will organize the operation . . . so that the Sycamore Store will be used and occupied almost exclusively by those persons specifically identified in the Zoning Ordinance as ‘professionals.’” Exhibit 54, Part V. Petitioner also argues that “the critical factor in determining the professional status of an office should be the nature of the predominant work performed in that office

[not at other locations].” Exhibit 131, p. 2. Petitioner adds that the majority of its staff at the Sycamore Store would be architectural, and the record clearly reflects the predominantly architectural nature of the work to be performed there.²¹

Since the construction contractor use, no matter how minimal at this site, does not fall within the definition of “professional,” it can only be permitted on this site if it is considered an “accessory use,” as discussed above. Looking at the definition of “accessory use” in §59-A-2.1, we must ask whether the proposed construction contractor use would be “*customarily incidental and subordinate to the principal [architectural] use,*” considering those words in light of the discussion in the *Zent* case. The Hearing Examiner cannot find, on this record, that a construction contractor use is customarily incidental to an architectural use. There may be other “architect-build” firms, but there is no evidence that it is the customary standard in the architecture profession.

Mr. Brenneman would like the entire “architect-build” firm to be accepted as essentially an architecture firm, based on his historical recitation of the combined role he says some architects now are reprising from the old “master builder” days. 5/12/06, Tr. 229-231. The Hearing Examiner fears that such an interpretation of the statute would eviscerate the very protections which the statute was intended to provide. The Zoning Ordinance clearly intended to allow the small intrusions into the residential community provided by a professional office, and not the much more commercial intrusion common to builders. Accepting Mr. Brenneman’s interpretation would at best blur the dividing line so as to allow much more invasive operations than Petitioner claims to intend.

On the other hand, one must recognize that in the modern architecture firm, as described by Mr. Brenneman, there will be ancillary functions that are not purely architectural. In this case, there is

²¹ Before Petitioner proceeded with this project, it obtained an opinion letter dated March 25, 2005, from Susan Scala-Demby, DPS Permitting Services Manager, who stated that she had reviewed information supplied by Petitioner and that “Brenneman & Pagenstecher, Inc. would be viewed as and qualify as a non-resident professional office.” Exhibit 23, Attachment 13. The Hearing Examiner does not give great weight to this conclusory opinion letter because Ms. Scala-Demby did not have the benefit of the record before us now in reaching her conclusion. Since her letter, there have been five days of hearings, numerous exhibits and a number of briefs on the issue, including one by the County Attorney.

a need for administrative support of the business which Petitioner seeks to conduct on site. The Hearing Examiner finds that this sort of administrative support for a professional firm is customarily incidental and subordinate to the principal use, and thus fits within the definition of an accessory use, even if the work of the proposed two administrative employees encompasses some administrative functions for the whole firm.

Petitioner's plan to have Peter Pagenstecher's office in the Sycamore Store is another concern. The Hearing Examiner finds that having the builder and head of the firm headquartered in the Sycamore Store and fully functioning as a building contractor would make this more than an accessory use. Therefore, the Hearing Examiner has recommended a condition which allows Mr. Pagenstecher to have an office in the Sycamore Store, but limits his activities to overall management of the firm, and expressly prohibits him from conducting his building contractor business from that office. The recommended condition also permits the two administrative personnel who do cross-over administrative work for the whole firm, as it is ancillary to the architecture office. The recommended condition is:

The non-architectural part of Petitioner's firm (*i.e.*, the building contractor business) may not operate out of the Sycamore store. Peter Pagenstecher or his successor may have an office in the Sycamore Store solely to conduct his overall management role for the firm, but he may not conduct his building contractor business there. The administrative employees of the firm may conduct their activities, which are ancillary to that which would be expected in an architectural office, at the Sycamore Store, even though those activities may be interwoven with some administration of the builder function.²²

In sum, the Hearing Examiner concludes that the legal issues raised in this case do not require denial of the special exception petition.

²² Petitioner's counsel indicated during the hearing that a condition prohibiting Mr. Pagenstecher from having an office in the Sycamore Store would not be acceptable to Petitioner (5/19/06, Tr. 236-238); however, it is within the Board's powers to impose such a condition, if the Board finds it "necessary to protect nearby properties and the general neighborhood." Zoning Ordinance §59-1.22(a). The Hearing Examiner finds that without the recommended restriction on Mr. Pagenstecher's activities, this use would impermissibly contain elements not authorized by Zoning Ordinance §59-G-2.38, which limits the use to a professional office.

III. SUMMARY OF THE HEARING

The Hearing in this case lasted for five days (November 4, 2005, April 10, 2006, May 12, 2006, May 19, 2006 and November 17, 2006) and included many witnesses, both pro and con. The Summary of the Testimony is organized by the type of testimony (*i.e.*, Petitioner's Case; Government Witnesses; Community Witnesses in Support; Community Witnesses in Opposition; and the People's Counsel) rather than by date of testimony; however, the testimony of each witness is individually summarized, and references to the applicable dates of that testimony are shown for each witness.

The Petitioner called four witnesses: Dean Brenneman, a principal of Petitioner; Bill Landfair, a land use planner; Stephen Petersen, a transportation planner; and Chris Cowles, a tree expert. Five government officials, David Murphy of the National Park Service, Michelle Oaks of the M-NCPPC Historic Preservation Office, Dan Janousek, of the M-NCPPC Technical Staff, Dan Hardy of M-NCPPC's Transportation Planning Division and David Niblock of DPS appeared during the hearing, but only the four local officials offered testimony, all supporting Petitioner's arguments.

Fifteen witnesses from the community testified in support of the petition: Sylvia Reis, President, Mohican Swimming Pool Association (4/10/06 Tr. 123-129; 5/12/06 106-111); Arrigo Mongini, President of the Mohican Hills Citizens Association (representing properties mostly west of Walhonding, 4/10/06 Tr. 130-137); Marion Ellis (11/4/05 Tr. 52-58); Lori Veirs (11/4/05 Tr. 60-82); Alexander Djordjevich (11/4/05 Tr. 82-94); Robert Hazen (11/4/05 Tr. 94- 109); Joe Saliunas (11/4/05 Tr. 111-121); Candace Charlton (11/4/05 Tr. 121-133); Wayne Goldstein (President of the Montgomery County Civic Federation -11/4/05 Tr. 133-142); David Haas (4/10/06 Tr. 112-123); Margaret Hazen (4/10/06 Tr. 138- 142) ; Harry Schwartz (former Director of Public Policy for the National Trust for Historic Preservation – 4/10/06 Tr. 143-150); Philip Thorson (4/10/06 Tr. 150-156); Adrienne Lewis (4/10/06 Tr. 157-160); Leslie Miles (5/12/06 Tr. 13-17).

Five witnesses from the community testified against the petition: John Juenemann²³ (5/19/06 Tr. 158-195); Ronald Nessen (5/19/06 Tr. 196-246; 11/17/06 Tr. 161-179); Norma Spiegel (5/19/06 Tr. 246-268); John Fenton, President, Glen Echo Heights Citizens Association (representing properties mostly to the east of Walhonding) (5/19/06 Tr. 78-85, 137-150); and Peter Winch, Second Vice President, Glen Echo Heights Citizens Association (11/4/05 Tr. 142-183; 5/12/06 Tr. 91-105).

Martin Klauber, the People's Counsel, supported the petition.

On the first day of the hearing (November 4, 2005), counsel for the parties, in response to questions raised by the Hearing Examiner, stated their positions on various legal issues which were subsequently briefed by the parties. 11/4/05 Tr. 13-50. It also came to light that notice of the specific requests for waiver of certain parking regulations had not been issued to all adjoining property owners and affected citizen associations, as required by Zoning Ordinance §59-E-4.5. Therefore, the Hearing Examiner polled those present to determine if they wanted to testify at that time, in spite of the notice issue, or wait till a second hearing date. Those who wished to be heard at that time testified on November 4, 2005, and the others were heard on subsequent hearing days. After some debate, all parties consented to this procedure. 11/4/05 Tr. 13-50.

David Murphy appeared on the first day of the hearing representing "the National Park Service and the parkland of the C&O Canal National Historical Park, and the George Washington Memorial Parkway." He stated that his position was "neutral," but that his "comments and concerns should be considered in the evaluation." However, he elected not to testify at the first hearing and never appeared for the later hearings despite being notified.²⁴ 11/4/05 Tr. 5, 50-51.

Following the fourth day of hearing (May 19, 2006), Petitioner substantially revised the site and landscape plans, by moving the bulk of the proposed parking facility to the rear of the Sycamore

²³ The Court Reporter incorrectly identified Mr. Juenemann as "John Giniman."

²⁴ Another witness, Shipman Gordon, appeared at the first day of hearing and indicated that he was a resident of the street immediately above the Sycamore Store; that he was neither for nor against the proposal; and that he would like to express concerns of those who live in the area. However, he never testified. 11/4/05 Tr. 8-9.

Store. It was therefore necessary to have a fifth day of hearings on November 17, 2006.

A. Petitioner's Case

1. Dean Brenneman (4/10/06 Tr. 222-290; 5/12/06 Tr. 17-91, 112-243; 5/19/06 Tr. 272-288; 11/17/06 Tr. 17-54, 118-129):

On the first day of his testimony (4/10/06 Tr. 222-290), Dean Brenneman testified that he is a residential architect practicing in Maryland and the District, with an office in Kensington, Maryland. He is a principal of the Petitioner, and Petitioner Brenneman and Pagenstecher, Inc., agrees to be bound by testimony and exhibits it presents and by any conditions that the Board of Appeals might impose should the special exception be granted. Mr. Brenneman described why he wanted the property, his research of the area and its history, the relevant portion of which is summarized below.

According to Mr. Brenneman, when this property went on the market, it sat for six months without being purchased “in what is arguably the hottest real estate market in recent history.” He learned that there had been only one offer to date, and it had been from someone who wanted to tear down the building. He, along with his business partners, made an offer to purchase the building to use for professional offices for his firm. His firm’s exclusive work is to renovate, restore and work on older homes. He wanted to have an office “that spoke to what we do and what we stand for.” He works with older homes “to thoughtfully and sensitively add to them, restore them, remodel them and . . . give them a continuing life in the community.”

Mr. Brenneman further testified that his background is as an historic preservationist. He served as the Chair of Rockville's Historic District Commission, and on the Board of Montgomery Preservation as both its Vice President and Treasurer, as well as other historic preservation groups. He wanted a building that spoke to historic preservation through “thoughtful, adaptive reuse.” It is also where the majority of his work is located.

According to Mr. Brenneman, Sycamore Store got its name from the nearby Sycamore Island, which is located immediately opposite Walhonding Road. It used to be covered with Sycamores. In 1919, the Sycamore Store began operations, and Mr. Brenneman relates that there is a tie between the Sycamore Store and Sycamore Island. The parking lot on the south side of MacArthur was originally the parking lot for the Sycamore Island Club. It became the parking lot that not only serves the Sycamore Store, but essentially the trail to the canal in that region

A realtor first showed Mr. Brenneman through the property in October 2003. At the beginning of November 2003, he called the two local citizens associations, Mohican Hills and Glen Echo Heights. Mohican Hills told him his project sounded like a fine idea and invited him to a meeting to discuss its members. The Vice President for GEHCA, David Ephrem, said it seemed like a reasonable idea, and he would discuss it with his Board because the association didn't have meetings. Mr. Ephrem did not get back to Mr. Brenneman; however, Mr. Brenneman did make a presentation to Mohican Hills Citizens Association, which gave its unanimous endorsement. He tried to contact Ms. Norma Spiegel from Glen Echo Heights, but she declined to meet with him to discuss his plans. He did meet with all the adjoining property owners, and he talked on the phone with property owners a little further in either direction and found support.

Mr. Brenneman began cleanup of the exterior and stabilization of the structure, trying to mothball it until preservation could happen. He met with the Board of Sycamore Island Club, and they endorsed his plan. He also met with the Mayor and Council of the Town of Glen Echo, who were also favorable. Mr. Brenneman then hosted a town meeting, renting a room at a nearby church, advertising it by Direct Mail to everyone home in Mohican Hills, Glen Echo Heights and the Town of Glen Echo. There was a large turn out with a long question and answer period, and he presented the entire history of the Sycamore Store as well as the development plans. Norma Spiegel attended.

Mr. Brenneman mailed informational mailings to every house in Glen Echo Heights, and he set up a website, “sycamorestore.com,” to give all relevant information about the property. He then mailed postcards out to the community asking for indications of support from the community, and received over a 150 cards back saying that they were in support of his project. According to Mr. Brenneman, most of the homeowners of Glen Echo Heights were very responsive, but the Glen Echo Heights Citizens Association, as an organization, has not been.

Mr. Brenneman identified photos of the Sycamore store and the neighborhood. He described the building as being “in very rough condition,” with a functionally obsolete heating system and no air conditioning system. Plumbing and electrical are also functionally obsolete. Its sewer line is clogged by roots and needs to be replaced, as well as its water service being undersized for anything other than the kitchen and one bathroom that are in it now. It has a dirt cellar floor and a crawl space which has been excavated out, but not properly underpinned. So the foundation of the building is vulnerable and needs to be underpinned and shored up. This building sits immediately adjacent to the main aqueduct serving the City of Washington as well as Arlington, Virginia, so having an unstable foundation “is a little bit of concern.”

There is a retaining wall on the east and south side of the building, retaining a 30 foot drop in grade from the corner of the property down to the building path. That retaining wall varies from rather short, in the range of foot or two, up to perhaps four and a half feet tall as it traverses the property. The back wall of the existing garage is a part of the three foot retaining wall. The retaining wall is interrupted by a Sycamore tree which grew as a sapling and is now so large that it has caused failure of a portion of the retaining wall. The entire retaining wall needs to be carefully taken down and put back up to restore it so that it will retain grade properly. There is severe erosion on the slope behind the wall that needs to be stabilized. The slope is, at the same time, being overtaken by

invasive plant species, ivy and/or kudzu, so in order to kill off the invasive species and stabilize the ground, substantial landscaping must be done on the slope to restore it.

Mr. Brenneman further testified that the existing garage appears to date from sometime in the late 1930s or 1940s. It is simple board and batten garage, directly on grade, with no proper foundation, and dirt piled up against it. The boards are all rotting at their bottom, and the structure is essentially subsiding into the earth. The slab that it sits on is severely cracked and deteriorated. In sum, the garage is not usable and would have to be rebuilt in order to have a garage there.

The corner of the Sycamore Store sits 1.2 feet from the property line on the Walhonding Road side and 1.9 feet from the property line on the MacArthur Boulevard side. It has a bow window which is not floor length, and the bow window curves out and essentially touches the property line on the MacArthur Boulevard side. According to Mr. Brenneman, the established building line guidelines state that you do not consider the building itself when you are calculating established building lines, and you do not use it when you are calculating a building that is not having an addition put on it. If you were to consider what the established building line is in this case, the current Sycamore Store structure would not be within the established building line, but the established building line is used for regulating increases in the size of the building, not for allowing the building to stay as it sits.

Mr. Brenneman stated that DPS's practice in handling home-owner renovations of nonconforming properties has been that you can get a building permit for anything that goes on within that building, as long as you're not increasing the nonconformity. If somebody wants to add a powder room inside their nonconforming house, they're allowed to do so.

As to the planned parking lot, Petitioner tried to continue an informal parking arrangement, but still make it look like it could have belonged to an older historic building by the treatment of surfaces and location of landscaping.

Mr. Brenneman used elevations and floor plans of the property to describe the original structure of the Sycamore Store and his plans to renovate it. In 1925, prior to adoption of the Zoning Ordinance in 1928, the original owners of the store added the following to the front of the building: wings on either side, a screen porch on the right side (looking from MacArthur Boulevard), additional space dedicated to the store on the left side, as well as an entrance stoop coming in from the side. These 1925 improvements are what brought the building within 1.9 feet and 1.2 feet of the property line, and they are also responsible for the current visible front elevation of the building and the configuration of the building as it has become historically established.

As to the proposed parking lot, Mr. Brenneman referenced the county code provision that in a special exception use, when you have more than three spaces, it becomes a parking facility. Petitioner's intent is to make a parking area that is simple and compatible with the community. According to Mr. Brenneman, as you drive along Walhonding Road, you see many gravel pull-offs or asphalt paved pull-offs, either parallel to the road or perpendicular to the right-of-way, a couple of them with as many as 7 cars. More within the range of 3, 4 or 5 cars along in those configurations.

Petitioner is proposing an eight car parking lot,²⁵ including one handicapped space and one space for visitors. [Originally, a seven-car lot was proposed, as required by the size of the building and the area calculations, but a subsequent redesign moved six spaces to the rear of the building, and allowed two spaces (the handicapped space and the visitors' space) to remain adjacent to Walhonding.] The parking lot would be constructed in blue stone gravel, with the exception of the van accessible space which will be constructed of concrete with an exposed blue stone gravel aggregate. Petitioner will use an asphalt tar and chip apron to further "deformalize" that parking area.

Petitioner will be adding substantial landscaping to the property. There will be a street tree on Walhonding Road, as well as shrubbery in front of the store to provide some shielding as one comes

²⁵ Mr. Brenneman initially testified that the proposed lot would hold seven cars, but the plans were subsequently revised.

south on MacArthur Boulevard looking towards the property. Just south of the parking area, in an area that is currently gravel, Petitioner is proposing another tree and shrubs to soften that parking area. The existing tree canopy line will not change, and it covers at least the back third of the building and over 50 percent of the parking lot of the property. Petitioner will also be providing additional planting and screening at the northeast corner of the property to provide additional screening of the parking for those walking down Walhonding Road or looking down Walhonding Road. Additional screening will be added on the back hill side since it needs stabilization. All of the existing landscape at the front of the building will be retained and additional shrubbery added to enhance it and fill in some of the bare spots. The existing hedgerow in the front on Corps of Engineer's land will be trimmed Petitioner to maintain visibility.

Mr. Brenneman testified that Petitioner is also willing to place additional landscape screening on the northwest side of Walhonding Road (*i.e.*, across Walhonding from the subject site). That land is partly owned by the Corps of Engineers; part of it is apparently owned by Montgomery County; and perhaps some of it is owned by the Mohican Pool, so the owners would have to agree, but the idea would be to allow further screening from the long view of the subject site as one comes south on MacArthur Boulevard.

Petitioner's concept of lighting is that the site should look like a residence from a lighting point of view. At each doorway to the building, a light fixture of a residential nature would be installed. Locations of lighting fixtures are noted in red on Exhibit 94 (an elevation). They are also set forth in the landscape plan (Exhibit 127(b) and the lighting plan (Exhibit 127(d)), and in addition, Petitioner would restore the Sycamore Store sign, which is itself considered an historic artifact. Petitioner also proposes an additional code-compliant sign (*i.e.*, less than two square feet) for his professional office.

The sidewalk is noted as an asphalt path. It was specifically added to the plan when Ms. Spiegel expressed a concern that people could currently walk to the corner on the formal gravel shoulder and that a way should still be allowed for people to walk to the corner.

Petitioner plans to restore the entire exterior. The plan is to re-roof the building because the roof is failing; restore the soffits and fascias; restore the exterior siding; restore the bow window at the front of the store; remove window grills and window air conditioners; and put up new gutters and down spouts. The only new work on the exterior will be the enclosure of a screen porch and the addition of a set of stairs to the existing balcony on the second floor, for fire egress purposes.

On the interior, a proper foundation would have to be installed, and the building would have to be entirely rewired. A new heating system and air conditioning system would be installed, along with new plumbing. The sewer line to the street has been invaded by roots and has to be replaced as well. It needs entirely new utilities for the building, as well as structural shoring up. Mr. Brenneman suggested that "This is way beyond the average Harry Homeowner fix-up, and it's why it didn't sell in six months on the market to homeowners at a time when home prices were going through the ceiling." 5/12/06 Tr. 133. He estimated retail repair costs between three quarters of a million and a million dollars to fully restore the building.

Petitioner is proposing to use the front part of the store as a reception and waiting area. At the back would be a small kitchenette and work room, with a bathroom on the first floor for convenience as to well as to meet Americans with Disabilities Act requirements. The living room would be essentially unchanged and used as a conference room. The dining room would be converted to an administrative office area. A partner's office would be located in what was the kitchen and breakfast room, and another partner's office in what was the screen porch. Upstairs Petitioner would have a desk area for three architects, as well as a general work area for blue printing and flat files, and a bathroom.

According to Mr. Brenneman these changes will be in compliance with the building code, but they will not require any zoning changes as it has no effect on the exterior envelope of the building. This is typically the way DPS handles the applications for renovation and alteration of structures.

Because there will be 2626 square feet of usable floor space, seven parking spaces are required, and they would be adequate for the operation of the business. Because of the nature of the work, construction naturally takes place at job sites, at homeowners' residences. Architects visit those job sites very intensely and regularly so they are often out of the office, rarely all in the office at the same time. As stipulated in the statement of operations, there is typically a lunch for everyone once a week on Wednesday. For that, Petitioner will need to park some cars elsewhere and car pool in. If Petitioner were to have any other meetings that exceed the parking capacity, similar arrangements would be made.

According to Mr. Brenneman, stacking six of the cars is not a problem because the lot will rarely be full, and it will be a small office where nobody is out of shouting distance to move their cars.

Also, the administrative staff come in first thing in the morning and stay through the end of the day, so there is no need to shuffle their cars.

The office is generally functioning from about 8 in the morning till 5:30 at night, but he encourages flex time, which is useful in this particular property to not cluster everybody arriving and leaving at exactly the same time. Primary office hours will be 7 a.m. to 5:30 p.m., Monday through Friday. Extended public hours will not exceed two evenings per week until 7 p.m., and during those extended office hours, no more than four staff members could be present at any time. There could be two staff members, maximum, between the hours of 5:30 a.m. and 7 a.m. Four could be present after 5:30 in the afternoon up to 7 p.m. Only two between 7 p.m. and 9 p.m. On the weekend, between the hours of 10 a.m. and 4 p.m., Saturday and Sunday, up to two staff members could be there. No staff

members are allowed on the property outside of that. And the meeting with clients or people outside of the company cannot occur in the later evenings or the weekend times. Petitioner is agreeable to the conditions that are in the Planning Board and staff recommendations, which are set forth in the October 28, 2005 Planning Board letter (Exhibit 37).

Client comings and goings are in the order of about five clients per week. Some days none. Some days you might have two meetings, but it's not a high frequency of clients coming to the office. The vast majority of meetings are with the clients at their homes or out at showrooms picking products for their houses. Subcontractors and other people who might stop in are much less frequent. Most of that meeting happens at job sites. A couple times of month, field staff may come into the office for something specific; the rest of the time they are out at the job sites.

Mr. Brenneman assured that there would never be trucks parked on site evenings or weekends. There will be some trucks coming and going on a random basis during the day. Some of the architects who will come in might at any given point in time be driving a marked company vehicle, but the majority of parking there will be staff in personal vehicles, not marked with any company signage.

Petitioner intends to maintain its current offices in Kensington in addition to the Sycamore Store, and it intends to use the Kensington office for receipt of any random materials, staging any construction, storing a large truck in a commercial parking lot nearby. Petitioner has a storage facility nearby there so that construction and operations will be out of Kensington. Architectural and administrative operations would be out of Sycamore Store. There is thus not much reason for field staff to then come to the office.

Mr. Brenneman argued that, even though a builder, Peter Pagenstecher, would be located on the site, the office was still a professional office for an architect. He stated that a company can be

involved in multiple businesses, but the question is what business is predominantly carried forth at a particular facility (4/10/06 Tr. 286-289):

The Adventist Church owns a hospital. That hospital is still a hospital, not a church. And we have the architectural offices proposed for the Sycamore Store. The way that we build is more like the traditional architect builders of the past. The construct of architects and builders being separate entities is a modern construct. Traditionally architects were builders and we are closer to that methodology. All of our architects are able to manage construction of their projects. Are able to oversee the details of that. So we're a holistic practice where the architects design their buildings, are deeply involved in the oversight of the construction as that goes on. And those are things that fall within the purview of the normal architectural practice.

In our case, we have a partner in the firm who is a licensed builder. Who is also the, a managing partner of the firm and therefore has his offices where the administrative staff is to support that which is the architectural office.

* * *

But I think you have to separate ownership of an organization. If this organization was owned by Marriott and it was nothing but architects sitting here doing architectural work for Marriott, would we be an architectural office? And I believe the answer is yes. That the ownership of a corporate entity is not necessarily germane to whether or not the work performed there is that of a professional office.

Mr. Brenneman indicated that Mr. Pagenstecher is the only builder who will be on the premises, but by virtue of his responsibility for managing the construction projects, he is the one most likely to be out in the field away from the office. There will be four architects in the office, including Mr. Brenneman, and there are two administrative staff who handle bill keeping for architectural work as well as construction work. Mr. Pagenstecher oversees the coordination of the construction work and design. Mr. Brenneman described him as “a licensed builder who implements the construction of our designs.”

Mr. Brenneman emphasized that this is not, a traditional “design build firm” . . . a construction firm which has hired designers to produce the drawings of the work they intend to construct. He is a licensed architect and he will have trained architectural staff working with him, which “is entirely different than a design department that is a boss, leader or a sales function for construction”

On the second day of his testimony (5/12/06, Tr. 17-91, 112-243), Mr. Brenneman testified that Peter Pagenstecher is the licensed contractor who carries the primary State of Maryland Home Improvement Contractor's License for the firm. He is also the president and managing partner of the corporation – he manages the books, the insurance and the financial and administrative aspects so that Mr. Brenneman is free to spend more time on the architecture portion of the business. In sum, Mr. Pagenstecher is not a liaison; he is an integral part in the business, but he is not a developer. The firm is in the business of designing and building residential remodeling projects, not building new homes. Thus, the firm is not a developer in the classic sense of the word, but rather a company hired by individual homeowners in the community to work on existing homes.

In answer to the Hearing Examiner's question, "would you characterize your whole business as that or is it an architecture firm," Mr. Brenneman responded that his business is a combination of things, an architectural component and an implementation component, which builds the work. The majority of the work that happens in the physical offices is the architectural component of the business and the administrative component, the support staff, as well as some administrative work that supports the construction part of the business, which happens outside of the offices. When the architects have completed their drawings, the construction documents, including all the blueprints, the written specifications and all of the client selection of materials, the firm puts together the final quote for construction, which is the phase one would expect in a construction firm.

Mr. Brenneman described the function of his office in more detail, and stated that he did not believe it would be appropriate for the firm to have a condition where Mr. Pagenstecher cannot work out of the architectural office because part of his function is to administer the architectural portion of the business, as business manager. Mr. Pagenstecher spends less than a third of his time in the office now. He spends the majority of his time going between job sites, coordinating the work as the prime

contractor. Work on any given site is supervised by a lead carpenter, who schedules the sub-contractors and orders the supplies.

Mr. Brenneman also described how the historical function of the architect has changed. In the latter half of the twentieth century and on into the twenty-first century, architects have begun to retake their place as the master builder, as the person who is in charge of the entire process and who drives the entire process. That is the model for his firm, which considers itself as an “architect-build,” firm not a “design-build” firm. It is a full architectural process, and Mr. Brenneman, as an architect, stands behind the full and correct implementation of his architectural documents. Mr. Brenneman indicated that Petitioner supervises and administers every detail of completing the building, including supervision of the sub-contractors to make sure all the work is done correctly and timely.

According to Mr. Brenneman, the things that would be brought via truck to the business are the same things that would be brought via truck to the business if this were only an architectural firm, such as the UPS truck and the mail truck. The business trucks that would ever come to the building are those vehicles that are driven by staff. The field employees, carpenters, et cetera, only rarely come to the office. The people who do the actual construction will not be appearing with trucks, either full of materials, or to get materials from the Sycamore Store. All of those staff are based in the field. They report directly to job sites in the morning; they leave from job sites at the end of the day; they are encouraged not to come to the office because Petitioner wants them out doing billable work in the field.

The building code will not allow use of the basement of this building for storage of anything, either office things or building materials because of fire code issues. So materials will not be stored on site.

Mr. Brenneman described the multiple parking waivers being requested. The setback for parking in a residentially zoned special exception requires that you setback the parking area, the normal front setback, and twice the side setback. Zoning Ordinance Section 59-E-2.83(b). This has not historically been the case on this property and it is not physically possible given the location of the building and other features. The second waiver item was the size of parking space set out in Section 59-E-2.22(g). The width of the area available for parking is limited by the building itself on one side and the property line on the northeast side is such that one space is short by about 18 inches. The statute would require screening from the public driveway and from the street. In the historical setting here, that has not occurred, nor can it occur here, because then you couldn't get the cars out. There is also no curbing to separate the parking area from the public street. Within the community of Glen Echo Heights, there are no parking lots separated by curb, gutter and driveway from the street, so this is in keeping with the informal residential character of this community.

Mr. Brenneman introduced an area map of existing parking areas and buildings in the neighborhood (Exhibit 92) to show that there are other large parking facilities in the area, including the parking lot that is unmarked and looks to be about 13 parking spaces directly across MacArthur Boulevard from the Sycamore Store. Many of these parking areas are visible from MacArthur Boulevard, and what Petitioner is proposing is not inconsistent with that pattern.

Mr. Brenneman made a power point presentation concerning the history and topography of the Sycamore Store and the area. Hazen and Veirs are the two closest, abutting property owners. Their homes run along the same elevation contour 30 feet above the Sycamore Store, and then the community goes uphill and back from there. In the winter, he can see the homes on the palisades from MacArthur Boulevard, but as the leaves fill out in like April, it moves rather quickly from somewhat obstructive to very obstructive. The Sycamore Store completely ceased to operate as a store in 1995.

Mr. Brenneman believes this operation can be conducted in this location without having an adverse affect on the neighborhood for a number of reasons. First of all, it's a low intensity use; the majority of the work of the business happens elsewhere, in people's homes, and so there is not a lot of activity that goes on in the office. Secondly, as an architect and as a historic preservation architect, Mr. Brenneman feels uniquely qualified to make the most sensitive rehabilitation of this building and establishing of the physical environment in which this will happen. Also being very familiar with historic preservation, he volunteered for the designation of the building, and it is important to have the designation of this building so that the community will always have a voice in maintenance of the exterior of this building. Mr. Brenneman also feels that it was important to show that a small mixed-use building that had been a residence and a commercial venture, predating the current building ordinances and land-use patterns, be maintained as a demonstration that you can do sensitive things with old buildings rather than tear them down or let them fall into disrepair, or be converted into an entirely different type of building. Mr. Brenneman does not anticipate that the proposed use will cause any objectionable noise, illumination, glare or physical activity as it relates to the surrounding neighborhood.

On the third day of his testimony (5/19/06 Tr. 272-288), Mr. Brenneman addressed some of the opposition testimony. He indicated that at the January 11, 2006 community forum held by the Glen Echo Heights Citizens Association, there was an express motion made by the community to invalidate the first survey to require a second survey, and in the interim convey to this office that the community retracted its opposition and had no position. It was Leslie Miles who made that motion and it was seconded by Laura Greenberg. The motion passed but it was later determined to have been made by somebody who was not a member, which created the controversy discussed by other witnesses.

Mr. Brenneman challenged the testimony of community opponent, John Juenemann,²⁶ asserting that Mr. Juenemann did not have a reasonable basis for estimating how Petitioner's business and other architectural firms operate or the costs of renovating the Sycamore Store. He characterized Mr. Juenemann as "a painting contractor who has grown from that into a general contractor which is a world away from the sort of work that my firm does." He noted that Mr. Juenemann has never been to his office nor observed Petitioner's work in process, nor its work product. He questioned Mr. Juenemann's assertions about the cost to renovate the building, having never been inside it and seen the problems with its foundation, and its mechanical, electrical and other systems.

Mr. Brenneman also disputed Mr. Juenemann's testimony about the possibility of walk-in contract workers. According to Mr. Brenneman, Petitioner has never had somebody walking into the office looking for a job in the 20 years he'd been in business. Petitioner also doesn't pay on-site workers at the office; it pays out in the field to field employees. Petitioner pays subcontractors through the mail and office staff mostly electronically, but some at the office.

Mr. Brenneman then addressed Mr. Nessen's testimony, stating that Mr. Nessen's house does have a view of the tail end of the parking spaces at the Sycamore Store in the winter, but when the trees are in leaf, he doesn't have that view. Mr. Nessen came to his office and said the problem here was the parking, and if that could be resolved, he'd support the project. Petitioner therefore sketched out a concept plan with parking in the back (Exhibit 110), but was concerned about the possible effects on the sycamore tree in back. Technical Staff also refused to approve it initially.

Mr. Brenneman stated that the greater view of MacArthur Boulevard is one of historically mixed uses. There is a pattern along MacArthur Boulevard starting at the District line and going all the way out towards Glen Echo of sporadic nonresidential uses along the road. There used to be a tavern two doors down from the Sycamore Store, and there was a hotel closer up towards Bonn Street.

²⁶ The Court Reporter incorrectly identified Mr. Juenemann as "John Giniman."

There are still various nonresidential structures generally at the edge of the residential communities. The community of Glen Echo Heights used to be a much larger community. The subdivision of Glen Echo Heights is actually Mohican Hills and Glen Echo Heights. They had a feud in the '30s and separated, but they are platted as one subdivision.

Mr. Brenneman urged the Examiner to think about the narrow nature of the community opposition that has been presented to this point in time. There have been five individuals who have spoken in opposition, but there have been 21 individuals that have spoken in support of it. Petitioner received 150 affirmative responses to a postcard Petitioner mailed out seeking support of people in the neighborhood.

Mr. Brenneman argued that the Sycamore Store is of MacArthur Boulevard, not of Glen Echo Heights. It is not one of the homes sitting above the Palisades; it sits on a flat piece below the Palisades. It is a lonely looking building there that is not immediately part of the greater community of Glen Echo Heights. It is one of the sporadic landmarks that one passes along the path of MacArthur Boulevard.

Mr. Brenneman rebutted suggestions that the Sycamore Store might be used as a single family residence. It didn't sell for over six months at any price as a single family residence. As a person who makes a living renovating older homes, Mr. Brenneman believes it would be not a very good investment for someone to put the kind of money it takes into this building to restore it properly and expect to get their money out of it from a resale point of view. He suggested that homeowners are not going to do that just out of charity.

On the fourth day of his testimony (11/17/06 Tr. 17-54, 118-129), Mr. Brenneman testified that Petitioner had revised its proposed parking lot and modeled the new version on a similar parking lot located nearby in Glen Echo. There is a business there in a renovated home that has triple tandem parking spaces, two rows of them, and that arrangement is being utilized on the subject site, as shown

in the revised site plan, Exhibit 167(a). The parking plan now has a more residential driveway. Gone is the large apron along Walhonding Road, and instead there is a 20 foot wide driveway apron that reduces to a 17 foot wide driveway, terminating in the rear with six parking spaces, in two rows of three. There is also room on the Walhonding side for a dedicated handicap-accessible van space and an eighth parking space next to it. The handicapped space will be used only for that purpose, and to provide a turn-around area when it is not occupied. This will allow Petitioner to “juggle the vehicles” without going out into Walhonding Road.

This arrangement also allowed an improvement of landscape screening as shown in the revised landscape plan (Exhibit 127(b)), which shows an area of three-foot tall plantings screening the additional parking space (which Mr. Brenneman described as a “visitor/flex parking space”) and the van accessible parking space from the public right-of-way.

Mr. Brenneman stated that, as a part of this proposal, Petitioner has added six foot screening all the way along the perimeter of the parking area wherever it faces an adjoining property, except for where the sycamore tree is located. So, Petitioner is achieving the required screening along all the parking area with that one small exception. Petitioner will also add a street tree at the front of the property.

During the weekly staff lunch and meeting, the amended statement of operations will call for no meetings with clients and subcontractors or other suppliers so as to avoid overburdening the parking lot. There will be a formalized parking plan, and all employees of the firm will be positively instructed in the operation of this parking plan. There will be a keyboard in the reception area of the office where every person coming in will put their keys and will correspond to the parking spaces to the map of the spaces. Additional copies of all employees' keys will be kept in a lock box in the office, and employees will be instructed on safety. The general idea would be to put the administrative people in the inner spaces. This is all incorporated in the statement of operations. Mr.

Brenneman's one disagreement with Technical Staff is that they want the eighth space to be dedicated as a visitor's parking space and Petitioner wants a little more flexibility.

Mr. Brenneman further testified that there is a stone retaining wall approximately seven feet to the rear of the building, and above that is the slope and that goes up to 30 feet of grade change to neighboring properties. At the top of that slope is a fence belonging to the neighbor. Their house is then behind that fence.

There's a large sycamore tree on the property which Mr. Brenneman indicated is not where the name of the store comes from. The name comes from Sycamore Island. The tree grew up in the retaining wall and broke a portion of it away, so it's right on the line of the wall. It's an enormous tree providing shade over the house and the parking area, and there are trees along the top of that hillside as well. The retaining wall at the back of the property currently ranges between 3-4 feet tall, and it will be approximately doubled in height at its highest point and then taper down. The wall is in a sad state of disrepair now. The hillside is fairly unstable and it's a part of the anticipated work on this property, without regard to this specific parking issue, to rebuild that wall to reinforce it and re-stabilize the hill. Petitioner would also put planting above it to complete the screening.

Exhibit 147 shows the impervious area for the revised site plan. It shows that currently there is a total impervious area, including both what is on site and what is in the public right-of-way that has been used as informal parking, of 5,235 square feet. It is now reduced to 4,701 square feet with the proposed site plan which is a reduction of proposed impermeable area of 534 square feet. Moreover, a significant portion of the impervious area is gravel and therefore will breathe and allow water through to the roots of the sycamore tree.

Mr. Brenneman also testified about the parking lot across Macarthur Boulevard from the Sycamore Store. He spoke with Mr. Dave McGregor who is the section head at the Corps of Engineers, Baltimore District, Washington Aqueduct. The Army Corps of Engineers owns the

MacArthur Boulevard right-of-way. Mr. McGregor was very familiar with the parking facility, and he stated that the Army Corps of Engineers has entered an agreement with Montgomery County, Maryland making Montgomery County responsible for the maintenance, operation, and control of the roadway and parking and bike path, in the public right-of-way, so the Corps owns the land but it maintains only the aqueduct beneath it. Montgomery County administers the roadway.

Mr. Brenneman noted that the parking area has no signage on it describing any restrictions or intended use of any sort, and is therefore an unregulated general public parking facility. He said that, historically, it was originally related to the Sycamore Island Club. This intersection was the terminus of a street car line that came to Sycamore Island at the beginning of the fledgling Glen Echo Park. The intersection was called Sycamore Junction, and over the years, the dirt road that was MacArthur Boulevard, previously Conduit Road, developed an informal parking area at the trail to Sycamore Island. Traditionally there has been a natural association between Sycamore Store and the park, the Sycamore Island and the parking area. When the Sycamore Store operated, certainly during its last years when it was doing more business as a deli counter and sandwich operation than it was in terms of groceries, at lunch time that parking lot would be full of people going to the Sycamore Store to get sandwiches.

Currently, the parking area is used in any number of informal ways. It is used by people who are going to the park; it is used occasionally by some commuters. On weekends, the parking lot is often entirely full, but during the week it tends to be only partially used. The parking spaces are not marked, but Mr. Brenneman indicated that he had seen 20 cars in it when it is really jammed full. He doesn't have an exact figure because it's an informal, unregulated space.

Mr. Brenneman does not know of any reason why the lot couldn't be used by Petitioner, if there were more than the number of visitors anticipated for a particular event, but the opposition has voiced a concern about that parking being intended for the park and for the canal, and that Petitioner

shouldn't use it. He indicated that Petitioner's daily parking requirements aren't that severe and on the occasions when Petitioner has an event which requires more people than can park on site, Petitioner can make arrangements with one of the other businesses along MacArthur Boulevard to park vehicles and shuttle people in. He noted that the parking lot on MacArthur Boulevard is public parking, and he doesn't have control if somebody comes to visit his office who is not an employee and who happens to park there.

2. Stephen Petersen (5/19/06 Tr. 9-78; 11/17/06 Tr. 92-117):

Stephen Petersen testified as an expert in transportation planning and traffic engineering.

On the first day of his testimony (5/19/06 Tr. 9-78), Mr. Petersen noted that Park and Planning had determined that the use was not one that generated sufficient trips to require a traffic study. However, at Petitioner's request, he did a full review of the trip generation and other issues that were raised regarding the intersection of MacArthur Boulevard and Walhonding Road, and its operation.

Applying Park and Planning's trip generation guidelines for offices, Mr. Petersen determined that the site would generate four trips in the morning peak hour and seven trips in the evening peak hour, clearly below the threshold of 30 trips listed in the LATR guidelines that would require a full traffic study. He also compared the square footage of the building with what Park and Planning would describe as a commercial use, a retail use, and the guidelines say it would generate five trips in the morning peak hour and 20 trips in the evening peak hour.

Mr. Petersen further testified that MacArthur Boulevard is an arterial street that operates in the area of the Sycamore Store in the north south direction and Walhonding intersects the east side as a T intersection, but it's not a 90 degree angle. Because it's not a 90 degree angle, the throat of the intersection is about 70 feet wide. Within that throat, there is a yellow centerline paint stripe which allocates approximately 33 feet of that 70 feet for traffic entering the intersection from Walhonding, which is wide enough for a car making a left turn to stack (*i.e.*, to stand next to the center line and

wait to make a left turn). A right turner who wants to go north on MacArthur can bypass the left-turning vehicle.

Walhonding has stop sign controls, and there is also a left turn prohibition sign on MacArthur Boulevard, coming southbound, prohibiting people from making a left turn into Walhonding during the morning rush on MacArthur Boulevard going southbound towards the city. The posted speed limit is 30 MPH on MacArthur Boulevard, and 25 MPH on Walhonding.

Mr. Petersen also did a traffic count during weekday peak hours and calculated critical lane volumes (CLV) of 965 in the morning peak hour and 671 in the evening peak hour. The observations were done on a Tuesday, in clear weather. A one-day observation is standard, and the data are considered typical by the County if collected on a Tuesday, Wednesday or Thursday. The critical lane threshold congestion standard for this policy area in the County is 1600, so Mr. Petersen concluded that the intersection is operating well below what the County considers a congested level of 1600. The proposed use it would add a maximum of four trips in the morning, bringing the a.m. CLV to 969, and seven in the evening, bringing the p.m. CLV to 678.

Mr. Petersen also posted a second person at the intersection at MacArthur during the time that the count was being made to specifically observe and measure the delay of all of the vehicles that entered the intersection that had to stop to wait for a gap in traffic on MacArthur Boulevard in order to proceed. It was determined from that study that not everybody is stopped and delayed. In fact, there are sufficient gaps, particularly in the morning, so that people making a right turn do essentially rolling stops. They're not there long enough to even measure the delay. The analysis showed that in the morning, during the three hours of observation, only 36 percent of the right turns were delayed; the other 64 percent went on their way. 80 percent of left turns were delayed.

For vehicles exiting Walhonding Road on the east side of MacArthur Boulevard, in the morning from 6:30 to 9:30 the average delay for left turns, those that were delayed, was 18 seconds.

The average delay for right turns was 12 seconds. For all of the vehicles entering the intersection, the average delay in the morning was 14 seconds. These figures were then analyzed by using the Highway Capacity Manual published by the Transportation Research Board, an arm of the National Academies of Science and Engineering, which is a national organization that collects research in numerous areas including transportation and publishes reports. The Highway Capacity Manual is a publication that specifically deals with the capacity of streets and highways and intersections and freeways. For a two-way stop intersection, which is how this intersection is characterized, there's a level of service grade attached to the amount of delay that is experienced. The level of service A is characterized as any delay that is 10 seconds or less. The level of service B is an average delay for vehicle of 10 to 15 seconds. C is 15 to 25 seconds. You don't reach a failing condition until the average vehicle is delayed 50 or more seconds. In this case the average delay in that morning peak morning of 14 seconds would yield a B level of service. These figures don't account for the fact that a large percentage of the morning traffic isn't delayed at all. When the rating is given in the Highway Capacity Manual, it is intended that it analyze an average including those who were not delayed at all. When they are included in the average, it comes out to an A level of service in the morning, since the average delays for all vehicles is just under nine seconds for the morning peak period and $9\frac{1}{2}$ seconds for the peak hour. Also, in the morning, the maximum queue observed by Mr. Petersen was 4 cars.

Mr. Petersen did the same kind of analysis for the evening peak period which is 4 to 7 p.m. Half of the left turns were delayed in the peak period. 39 percent of the right turns were delayed. The average delay for that period was 15 seconds for the left turns, $12\frac{1}{2}$ seconds for the right turn. An average for both is 13 seconds, for level of service B. Through the peak one hour 4:30 to 5:30, the delays were $23\frac{1}{2}$ seconds for the left turners, of which there were only two vehicles during that entire hour that made a left turn. For the right turns, the delay was 14.8 seconds. This averaged a 15.3

second delay of the combined right and left turns, for level of service C. Taking into account the vehicles that were not delayed in the evening, the average for all vehicles entering the intersection is 9 seconds for the entire period, which is the level service A. For the peak hour, the average is 11 seconds which is level of service B. In the evening peak hour, there was one instance where we had six vehicles in a queue.

Mr. Petersen concluded that the proposed use would not change the average delay in any measurable fashion.

Mr. Petersen opined that MacArthur Boulevard is a highway for purposes of this special exception because it is a public way for purposes of travel by vehicle. He read a definition of “highway” included in the 2003 edition of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD). Quoting from the definition of words and phrases in that manual, a highway is defined as “a general term for denoting a public way for purposes of travel by vehicular travel including the entire area within the right-of-way.” 5/19/06 Tr. 28-29. If you then proceed to the definition of street, it refers you back to highway.

In Mr. Petersen’s opinion, the proposed use will not create a nuisance because of traffic movement, traffic entering and exiting the facility or because of traffic volume. He also opined that the use is served by adequate public transportation facilities.

On cross-examination, Mr. Petersen testified that the government cannot prohibit a property owner from having access to the street through a driveway, even though the sight distances to the intersection may not be ideal. If one has a corner lot, it is not likely to have ideal sight distance to the intersection unless it is at least an acre in size, which might yield a frontage of 200 feet or more. In his opinion, the proposed location of Petitioner’s driveway relative to the intersection was not unsafe. [Some of Mr. Petersen’s testimony on May 19, 2006, was not summarized because it was superseded by Mr. Petersen’s testimony on November 17, 2006, following revisions to the plans which moved

the parking facility to the rear and moved the edge of the driveway apron further away from the intersection of MacArthur Boulevard and Walhonding, thereby increasing the sight distances.]

On the second day of his testimony (11/17/06 Tr. 92-117), Mr. Petersen evaluated the revised parking arrangement. In his opinion, it is a more functional plan than the original one, under which it was more likely that people would have to back out into Walhonding Road in order to get in and out of the spaces. Under the revised plan, the way the parking is set up and given the two spaces that are at right angles to the general parking aisle, there will be the opportunity and space to turn vehicles on site so that they can leave the site in a forward position, which gives improved sight distance and improved opportunity to observe conditions. It is therefore a safer and more functional plan. Given the fact that this is not a high turnover parking facility, it's an office where there will not be a lot of in-and-out activity and there is an adequate parking management plan, in Mr. Petersen's opinion, the revised parking arrangement will work very well. Mr. Petersen also indicated that you don't need a drive aisle between cars in a parking lot with only six tandem spaces.

Mr. Petersen opined that the revised plan improved the visibility and safety for turning movements out of the driveway because the measuring point that you use to measure sight distance is now moved further away from the intersection by eliminating a 25 foot portion of the driveway apron. Under County standards, you pick a point in the middle of the 20 foot driveway, six feet back from the edge of the public right-of-way (*i.e.*, the point where the eye of the driver making the observation is located), and you draw the line of sight from that point to the center line of MacArthur Boulevard, which is a sight distance of 122 feet.

In Mr. Petersen's opinion, the speed of a vehicle around a turn is probably about 20 MPH by virtue of the curvature. At a speed of 20 MPH, the required sight distance, according standards of the American Association of State Highway and Transportation Officials (AASHTO), is 115 feet (75 feet for reaction time plus 40 feet for stopping time), well within the 122 foot sight distance in this case.

Mr. Petersen used AASHTO standards because the County table of sight distance doesn't go below 25 MPH. The AASHTO standard is very conservative because it assumes a 2.5 second non-emergency reaction time. In emergency situations drivers typically react much quicker than 2.5 seconds, as low as 3/4 of a second, which would further reduce the total stopping distance.

The County standard for sight distance at 25 MPH is 150 feet (and AASHTO's is 155 feet at that speed), but Mr. Petersen feels that a sight distance of 122 feet is adequate because cars slow down to about 20 MPH when rounding a corner like this one (even if the posted speed on MacArthur is 30 MPH) and because the design standards assume a slower reaction time than occurs in emergencies. In Mr. Petersen's opinion, the access and circulation for the proposed parking facility are safe and efficient for both pedestrian and vehicular traffic, and the requested waivers, if granted, would not impinge on safety or operation of the facility.

3. William Landfair (5/19/06 Tr. 86-135, 268-271; 11/17/06 Tr. 129-146):

William Landfair testified as an expert in land use planning.

On his first day of testimony (5/19/06 Tr. 86-135, 268-271), Mr. Landfair defined the neighborhood of the subject site as bounded by Wiscasset Road to the northwest; Massachusetts Avenue to the northeast; Sangamore Road to the east; Potomac Palisades Park to the south; and the Potomac River to the west. He noted that this definition is broader than ordinary, encompassing an area about 2500 to 3000 feet from the site. Mr. Landfair used a broader definition because many of the interested parties live within that area and the roadways within that neighborhood all either intersect or feed traffic out onto Walhonding Road. On cross-examination, Mr. Landfair indicated that you could draw the boundaries more in a linear fashion along MacArthur Boulevard to reflect the Sycamore Store's relationship with other uses along that stretch, such as Glen Echo Park. There are also more people moving along MacArthur than up and down Walhonding, but for the most part they

would be commuters. Moreover, most of the changes to the property are along the frontage with Walhonding Road, and some of the extended area along MacArthur is in a C-1 Zone.

Mr. Landfair opined that the application conforms to the Bethesda/Chevy Chase Master Plan, which was adopted in 1990. The Master Plan supports the existing R-90 Zone for the property, and the proposed use for a professional office is allowed by special exception in that zone. The Master Plan does provide guidelines for special exception uses, particularly in residential areas. These guidelines include avoiding an excessive concentration of special exception uses, particularly office type uses, either in residential areas or along major highway corridors. The Master Plan also suggests that when special exceptions are being reviewed that the design be looked at very carefully to ensure that it is not incompatible with the residential neighborhood. Alterations or additions should be compatible with the architecture of surrounding buildings in the neighborhood. The Master Plan also talks about parking and suggests that parking should generally be discouraged from the front yard, where it would be more visible.

According to Mr. Landfair, the application meets virtually all dimensional standards for the use, including lot area, lot width, building coverage, green area, building height, and the number of parking spaces. It does not meet the front yard setbacks for the building because the setback for the building from MacArthur Boulevard is 1.9 feet from the front property line and 1.2 feet from the property line along Walhonding Road. Nevertheless, it is Mr. Landfair's opinion that this building will not need variances from those particular setbacks because building is a nonconforming building and predates the current zoning for the property.

Mr. Landfair noted that any parking area that provides three or more spaces for special exception use in a residential zone is a parking facility and must satisfy the applicable front, rear and side yard setbacks. The standard size for parking space in the County is 8 1/2 by 18 feet. It is his understanding that when you're calculating parking requirements, you do not have to add an

additional space for the handicap parking; however, Technical Staff looks beyond the statutory requirement to determine the functionality of the planned parking facility with the planned number of spaces. In Mr. Landfair's opinion, the parking facility will provide safe and efficient parking with seven spaces [which was subsequently increased to eight under the revised plans]. He suggested that, if the parking facility is full, people could park in the lot across MacArthur Boulevard, which is not restricted. [Some of Mr. Landfair's testimony on May 19, 2006, was not summarized because it was superseded by his testimony on November 17, 2006, following revisions to the plans which moved the parking facility to the rear and narrowed the driveway, moving the edge of the driveway apron further away from the intersection of MacArthur Boulevard and Walhonding. These changes modified Petitioner's parking waiver requests.]

Mr. Landfair further testified that there will be adequate public water and sewer service in the area to serve this use. Petitioner's engineers compared the water and waste generated by the old Sycamore Store with what would be generated by this use. And in this case, the proposed special exception will use slightly more water than the old Sycamore Store would have, but will generate slightly less wastewater. In any case, the adjacent water and sewer lines are more than adequate to accommodate the use.

In a letter dated May 31, 2005 the County Department of Permitting Services granted an exemption from storm water requirements for the site because the existing building was being retained and the amount of land disturbance was less than 5,000 square feet, which is the threshold that would trigger a storm water management review. In Mr. Landfair's opinion, the reconstruction of the property will not create a storm water overflow onto adjacent properties. DPS also recommended that Petitioner use porous surface for paving material, which Petitioner's will follow by using bluestone chip gravel.

In a memo dated May 10, 2005 the environmental staff at Park and Planning approved an exemption from the forest conservation law, noting that a tree save plan would be a condition of approval. This tree save plan would focus on the 36 inch caliper sycamore tree located in the rear yard of the property, which is in good shape. It is a very old, very fine specimen tree, and the arborist believes that it will last many years. It is part of the environmental setting for the property itself, and if it were removed, people would be quite aware of this removal and would find that it would be a loss. Also from a practical perspective, it provides shade, and parking facilities need to be shaded. It is a requirement, so it is contributing to the canopy that is providing shade across about two thirds of the parking facility.

Mr. Landfair explained that, with special exception applications, there is a requirement to take a look at the inherent effects of the special exception use. He agreed with Technical Staff that the impact of the building, the traffic generated by the use, the parking on site and the lighting are all inherent effects. He noted that the Applicant will take great pains to preserve the appearance of the structure, to restore it and to renovate it to accommodate the office. Mr. Landfair described the structure as unique and “something of a hybrid.” The front of the building itself looks like a country store, while the rear half is residential in appearance. In his opinion, this is part of the charm and part of the reason why Historic Preservation staff and ultimately the County supported its classification into the Historic Master Plan. Everything, including the existing sign, is going to be preserved, and in his opinion, the building itself will remain compatible with the surrounding community.

In terms of vehicle traffic, Park and Planning guidelines suggest that the number of peak hour trips in the morning would be four and the evening would be seven, most of which will be generated by the employees themselves and by the occasional delivery service coming to the site. Mr. Landfair opined that the roadways can accommodate this traffic. Few clients themselves will actually come to the site, and typically the employees go out to the client's homes or businesses to meet with them.

Mr. Landfair observed that lighting is a very sensitive issue in a residential area. In this instance, the lighting proposed will be wall mounted fixtures, all but one next to a doorway. They will be set and controlled by timing mechanisms, so they will be on for limited periods of time. There is one spotlight, which is located at the northwest corner of the building, expressly for the purpose of lighting up a very small discreet sign identifying the office on the building itself. That light is directed simply onto the sign, and there should be very little, if any, spread. Mr. Landfair believes, based on his own observations and conversations with lighting consultants, Petitioner should have no problem at all meeting that 0.1 foot candle limit along the side property line. This will be confirmed by a photometric study.

Mr. Landfair stated his opinion that the application will be consistent with the Master Plan. The Master Plan supports the current zoning, which permits the special exception sought in this case. In addition, Mr. Landfair opined that the proposed use will be in harmony with the character of the surrounding neighborhood; will not be detrimental to the use of adjoining residential properties; will not cause any objectionable condition or activity on site; will not alter the predominantly residential character of the surrounding neighborhood; will not affect the character of the neighborhood adversely; and will not affect adversely the health, safety or welfare of residents, visitors or employees. Thus, the application is consistent with the general conditions that have to be met for every special exception.

Mr. Landfair outlined why, in his opinion, the proposed use complies with the specific criteria for a non-resident professional office found in Section 59-G-2.38 of the Zoning Ordinance. The requirements of this provision were modified by a Zoning Text Amendment approved in 2005. According to Mr. Landfair, the Council was aware that this ZTA was focused on this specific site and knew the special exception would be sought on this property if they adopted it. The text amendment modified the requirements to allow the use in the R-90 Zone under certain instances, including when

the property is designated as historic in the Master Plan for Historic Preservation. The Council approved an historic designation for the subject site, and the full Commission at Park and Planning adopted it.

Secondly, the use itself must be located along a highway. MacArthur Boulevard in this area has a right-of-way that is varied. There's an existing right-of-way of at least 120 feet, and for the most part, the roadway is quite wide. Adjacent to the subject property, it's about 150 feet wide, so, in Mr. Landfair's opinion, Petitioner meets the highway criterion. Finally, the proposed use must be located in a structure formerly used for nonresidential purposes. For most of its history, according to Mr. Landfair, the Sycamore Store was a store, and in Mr. Landfair's opinion, the Petitioner thus meets that requirement as well.

The Ordinance specifies what uses are allowed to occupy a non-resident professional office and lists architects as one of them. Eighty or ninety percent of the use of the office will be by architects or for the practice of architecture. There will be a principal of the firm who will be on site on occasion, who is not an architect, but his work will be very limited on site. In Mr. Landfair's opinion, as a whole this will be an architect's office, and so it fits the definition for nonresidential professional office. However, in his experience as a land use planner, he was not aware of approvals by the Board of Appeals in situations where there were some other individuals using the office.

Mr. Landfair noted that the minimum green area required for the property is 25 percent. Petitioner will provide 41 percent green area on the property.

On his second day of testimony (11/17/06 Tr. 129-146), William Landfair testified that he had reviewed the revised special exception site plans and found that the redesigned parking facility is a better facility in terms of its appearance to the neighbors and the community, and that it should not create a problem with safety and efficiency.

Mr. Landfair also opined that, with respect to the waivers requests, the revised plan is an improvement. There were five waiver requests regarding the parking facility. The first one related to setbacks; the second related to the size of the parking spaces; the third related to screening of the parking facility; the fourth related to separation of the facility from sidewalks and roadways; and the fifth had to do with the marking of the parking spaces themselves.

With respect to the setbacks, there's no change in the setback of the parking facility from the front property line along Walhonding Road; however, the setback from the rear property line has increased to three feet, so the waiver being sought is the waiver of 22 feet from the 25 foot rear yard setback. On what is now considered the side yard property line (formerly the rear yard property line), the setback has been reduced to 26 feet, but that is still in excess of the side yard setback requirement of 16 feet.

With respect to the size of the parking spaces themselves, all eight parking spaces now are in compliance with the size requirements for those spaces which, for the standard size space, is 8.5 feet by 18 feet. With respect to the screening, the waiver is still required but Petitioner has added considerable additional screening both along the frontage with Walhonding Road, with a three foot hedge, and along the side property line, screening it from the adjacent residential property.

The separation from the sidewalk and roadways has been improved by adding a landscape strip, although a waiver is still needed because there is no curb, which the ordinance calls for. The two parking spaces closest to the roadway are parallel to it, so there is no concern with respect to vehicles overhanging into the right-of-way or the sidewalk area. Finally, there is still a need for a waiver regarding the delineation of parking spaces because the blue stone chipped gravel which is being used for residential and historic appearance doesn't lend itself to marking.

In Mr. Landfair's opinion, the granting of those waivers would still allow Petitioner to achieve the purposes of the Zoning Ordinance's parking standards.

Mr. Landfair testified that Petitioner revised the parking facility to minimize the view of the parking, particularly from Walhonding Road and to a lesser extent from MacArthur Boulevard. Under the revised plan, somebody driving along Walhonding Road would see just the rear of two stacked vehicles, and the van accessible space and standard space next to it. Because the driveway width has been narrowed down from what it was previously, the parking facility can be better screened and is much less visible, as shown in Exhibit 146. The additional setback also helps to reduce visibility to those north of the site. He opined that this is a much improved parking facility, in terms of being in harmony with and compatible with the surrounding area.

Zoning Ordinance §59-E-2.4 requires that each parking space have access to a street via adequate interior aisles and driveways, except that where cars will be parked by attendants, at least 50 percent of all parking spaces shall have direct access to interior aisles and driveways. Mr. Landfair indicated that the revised plans would leave 50 percent of the cars with access to an interior aisle and the driveway, which is consistent with that code section. The County requires that a drive aisle for two-way traffic be 20 feet wide. The only place where Petitioner's drive aisle narrows to less than 20 feet in width is where it's actually not a drive aisle, but the parking spaces themselves which comply with the standard width. Thus, the part of the parking facility that is operating as a drive aisle is 20 feet in width, as required. Mr. Landfair observed that stacked parking, while not preferred, is done in connection with special exception uses, and in this case he believes it will be safe and relatively efficient, given the number of spaces and the fact that, for the most part, this parking facility is being used by the employees who will use it day in and day out, thereby gaining familiarity.

4. Chris Cowles (11/17/06 Tr. 146-160):

Chris Cowles testified as an expert arborist. He stated that he has a BS in forestry and for the last 29 years has been working solely in tree preservation, both for the state and local governments

and as a private consultant, and as an arborist. He is a Maryland registered professional forester, and has been certified as an arborist by the International Society of Agriculture.

Mr. Cowles prepared a report (Exhibit 127(e)) concerning the preservation of the sycamore tree on the subject site if the revised parking facility is installed. Mr. Cowles testified that, in his opinion, the sycamore tree on this subject site will survive the parking arrangement that is proposed. He stated that he was very pleased with the use of the stone and gravel parking instead of paving, which will allow air and water to pass through. He indicated that he would place a heavy duty neo-textile blanket on the existing soil roots to spread the load and then the stone goes on top of that to avoid undue compaction of the roots.

Mr. Cowles indicated that his firm examined the health of the tree, which is good; evaluated the design and construction methods; and will produce a final plan to minimize impacts from construction and provide stress reduction measures on a long-term basis for the tree. The construction will cause some impact, but he feels very confident in the survivability of the tree. He estimates the tree roots extend throughout the entire parking area and beyond, especially up the adjacent hill where they could grow unrestricted. Mr. Cowles testified that he is aware of the requirements of Park and Planning and the Historic Preservation Commission, and would meet or exceed them. An arborist will be present during construction of the retaining wall to minimize risk to the roots.

B. Government Witnesses

1. Michelle Oaks, M-NCPPC Historic Preservation Office (4/10/06 Tr. 26-63; 11/17/06 Tr. 81-89):

Michelle Oaks testified that she is a senior planner with the Montgomery County Park and Planning Historic Preservation Office. She is the staff person assigned to the subject case. The Council enacted Resolution Number 15-1247 (Exhibit 73) on December 6, [2006], designating the Sycamore Store as an historic site in the Historic Preservation Master Plan. Thus, it has been

approved by the County Council and is currently awaiting review and adoption by the Planning Board, which is the formal process used to amend master plans. The Planning Board does not alter such additions, once the County Council has approved them. During the eight years she has worked there, there has never been a time when the Planning Board has failed to amend the Master Plan for Historic Preservation after the Council had passed a resolution designated an historic site.

Ms. Oak's summarized a letter dated November 1, 2005 from Julia O'Malley, Chair of Historic Preservation Commission to Alison Fultz, Chair of the Board of Appeals regarding the Sycamore Store (Exhibit 74). The Historic Preservation Commission felt that it was in the public interest to approve this special exception. They felt that this special exception was an excellent adaptive reuse for this structure, namely because the proposed changes are consistent with the Secretary of Interior Standards for Rehabilitation, in that they will ensure that the property will continue to be used as a commercial building, and there will be no exterior changes to the historic fabric of the building. The only exterior changes are to glass in the screen porch and to install an exterior stair.

The Commission felt that was very important because when you're looking at making adaptive reuse, there are frequently many changes to the building. So the Commission was excited about having an adaptive reuse without any exterior changes to the building. The Commission does not review interior changes to buildings. The Commission concluded that the project was sympathetic and compatible to the historic character of the property. The Secretary of the Interior's Guidelines encourage maintenance of the current use wherever possible.

The commission wanted the on-site parking lot to continue to be gravel, except for the handicapped space, which should have, more solid surfacing such as exposed aggregate. A gravel surface is preferred over something like concrete or asphalt in the context of this application because The Commission tries to maintain the character of the site, and given the fact that this was a rural

store, it was looking to maintain that rural fabric, which is gravel. You wouldn't see historically concrete or asphalt in this location. It would also be inadvisable to move the parking lot and put it in front of the structure because that would change the context of the building and create a false sense of history.

When the Commission looks at an historic designation, it considers a period of significance for the building. This particular building's period of significance is about 1919 or 1921, when the building was built. So anything beyond that is outside of the period of significance, and the existing garage is not considered significant because it's outside of the period of significance. The Commission tries to maintain the historic character of the entire setting, but it has no jurisdiction over interiors.

Back in 1919, there was a parking lot, but it was not officially designated for seven cars. There is an undefined space in that location of gravel with the garage location in the northern end. You would not have been able to fit seven cars into the lot in the orderly fashion now planned; however, the Historic Preservation Commission did not believe that those six or seven spaces would alter the historic environmental setting of this store. Their only statement regarding the parking was that they wanted as much of a parking behind the structure as possible, away visually from the most prominent façade, that being the façade on MacArthur Boulevard. The parking plan as shown in Exhibit 65-A, which moved parking from the right-of-way onto the residential property, would achieve that goal of reducing the visibility of the parking and getting parking away from the front façade of the building. The Commission did not feel that the planned lot would negatively impact that location because paving in other locations on the site was being removed, so the overall paving balanced out, and there was no increase in impervious surface. Also, retaining walls are being restored, and all the trees are being maintained.

Importantly, the historic use of the building, which was commercial (a store) is being retained, albeit as professional offices. The Commission felt that keeping it commercial versus turning it into a residence was very important because the architectural firm in this particular instance is not going to be removing historic fabric on the interior. It would not be possible to preserve the same historic fabric interior by having it as a single family residence. Owners of a residence are not going to want a big Sycamore Store sign on their residence, and that's something that the Historic Preservation Commission feels very strongly about maintaining. Only the upstairs had been used as a residence, and it just would not work as a dwelling as it stands now. The idea of adaptive reuse is a minimal change to an historic building by maintaining a new function for the building. It is important for the building to be used.

Sycamore Store is an historic landmark on MacArthur Boulevard.

After subsequent revisions to the plans, moving the parking lot to the rear of the site, Ms. Oaks was recalled and testified that she reviewed the revised plans for the site's parking facility set forth in Exhibit 167(a) and Exhibits 127(b), (c) and (d), which include the site plan, landscaping plan, landscaping details and lighting. These revisions have been presented to the Historic Preservation Commission, and the letter in the record, dated October 24, 2006, Exhibit 140, from the Historic Preservation Commission Chairman accurately summarizes the position of the Historic Preservation Commission. The bottom line of the letter is that, subject to work permit requirements, the Historic Preservation Commission approves of the new parking arrangement.

Ms. Oaks indicated that the Commission understood that the existing retaining wall will be rebuilt as required, and then it will be a four foot to eight foot tall, with the stone veneer. As to the existing Sycamore tree, she believes that the appropriate measures were being taken to ensure the survivability of the tree. If and when the special exception is approved, a tree protection plan will be part of that application, and it will be reviewed at that time by the arborist at the M-NCPPC.

According to Ms. Oaks, when the commission looks at a historic property, it looks not only at the building itself but at the immediate area around the building, including an environmental study. However, even if the tree could not be saved, that does not mean the project would be disapproved. The Commission often approves removal of trees, recognizing that communities are ever-changing. The goal would be to do everything possible to ensure that the tree is going to survive, make sure that the arborists provide a protection plan and ensure that those tree protection measures are in place, but “we can't control everything.”

The Commission's first goal for this property is to ensure the survivability of the historic structure. There is currently a proposal to rehabilitate this historic structure. It has been vacant for several years now and it's deteriorating, and the first goal is to ensure that this structure is rehabilitated. The Historic Preservation Commission sees a proposal to preserve this historic structure, with a sympathetic parking plan that is going to preserve an environmental setting, an applicant that is doing everything he can possibly can do to preserve all of the existing foliage on the property. While there has been a lot of discussion about potentially doing something else on the property, the Commission can only evaluate what is currently in front of it. It can't speculate what is potentially going to be or could potentially come on the horizon.

Ms. Oaks does not feel that having seven or eight parking spaces in the rear yard is inconsistent with the historic setting. She believes it's compatible given that this is an adapted re-use. The goal is to ensure the survivability of the historic building, and also to ensure that it's to be utilized. That may mean, because it's going to be an adaptive re-use, there will be a parking area.

The Commission does not allow alterations and changes to the principal facade, the most significant historic facade of the house, so, the applicant has strived to ensure that all of these changes are to the rear. When changes are made, the ordinance and the Secretary of Interior standards specifically say, that all changes and alterations are to be placed at the rear. She

feels that the applicant has done everything that specific ordinance asks. Her job is not to go in and tell people how to design their projects. Rather, she evaluates compatibility, and she feels that this current proposal is compatible.

On both Exhibits 167(a) and 127(b), there is a notation about the sycamore tree and it reads, “arborist to specify reasonable measures to minimize impact on tree.” That provision is satisfactory at this stage of the proceeding. A very specific tree protection plan will be required, and the historic area work permit will be very specific and detailed. The applicant has to come in to get an historic area work permit prior to applying for building permits, and once he gets a historic area work permit, staff has to stamp those drawings and approve the tree protection plan prior to applying for the building permit. Therefore, all the tree protection measures will be evaluated and approved by M-NCPPC’s arborist before applicant can get building permits from DPS.

2. David Niblock, DPS (4/10/06 Tr. 63-106):

David Niblock²⁷ is a Permitting Services Specialist at DPS. He appeared at the hearing at the request of the Hearing Examiner, and was questioned by the parties. Mr. Niblock testified that he was familiar with the facts of the case. 4/10/06 Tr. 65. He indicated that DPS, in applying Zoning Ordinance §59-59-G-4.12, would grant a permit allowing a nonconforming structure to be altered or renovated, without requiring a variance, as long as the structure was not enlarged beyond its current footprint. 4/10/06 Tr. 65-69. He stated that DPS’s rationale for this interpretation was that it would be an “undue hardship” to require a variance to do renovations within the already existing footprint. 4/10/06 Tr. 70.

Mr. Niblock further testified that DPS would allow an owner of a nonconforming structure to enlarge into an area that had available setback, as long as the nonconforming area was not being increased or made worse. The exact exchange on this point was as follows (4/10/06 Tr. 71-72, 95):

²⁷ The Court Reporter incorrectly spelled the witness’s name as “Nieblock.”

Q The structural alterations in the context of 59-G-4.12 talk about any structural alteration of a building or only structural alterations that are within the area that would either expand it or in the area that is nonconforming.

A It doesn't really talk about which area of the building or sites. So we have determined that if it's, again, not making a nonconforming situation any worse then the department would issue a permit for it.

Q Okay. So absent historic preservation issues, if Mr. Brenneman wanted to bump out part of a building where there is setback area to do so, you would allow him a permit to do that. But you would not allow him to encroach anyplace where he has a shortcoming on the front yard setbacks.

A Correct, correct. So if you had an area of the house that had sufficient setback for an addition, they would be allowed to go in that area, but at no point would they be able to go into an area that is already nonconforming or not complying.

Mr. Niblock indicated that DPS did not have any published guidance on this interpretation of the Zoning Ordinance, and he had not consulted others in the Department about the issue. He is also not aware of whether DPS considered asking the Council to amend the Zoning Ordinance so that it would allow alterations to nonconforming structures without a variance. Nor was he aware of whether DPS gave thought to a public policy regarding the phasing out of nonconforming uses and structures when it decided to interpret Zoning Ordinance §59-G-4.12 to allow alterations and renovations, without a variance, of nonconforming structures, as long as the alteration or renovation did not increase any existing nonconformity. 4/10/06 Tr. 96.

Mr. Niblock applied the same reasoning to conformance with the established building line (EBL), provision of Zoning Ordinance §59-B-5.3(d), requiring compliance with EBL requirements only if the building is being enlarged. New work would have to conform to the EBL. Tr. 105-106.

According to Mr. Niblock, enclosing a screened porch would not enlarge the footprint of the building because the screened porch is already considered by DPS to be an addition for setback purposes. 4/10/06 Tr. 98-99.

In Mr. Niblock's opinion, the Sycamore Store was rendered conforming by the language in Zoning Ordinance §59-B-5.3. 4/10/06 Tr. 75. Interpreting §59-B-5.3(a), Mr. Niblock testified that

the “lot” in question conformed to the 1928 Zoning Ordinance, and that that subsection does not apply to the structure on the lot. 4/10/06 Tr. 99-100.

3. Dan Janousek, M-NCPPC Technical Staff (4/10/06 Tr. 176-221):

Dan Janousek testified that he is a zoning analyst for the M-NCPPC. He is very familiar with the case, having visited the site and having written two staff reports about it. He indicated that hearing the testimony of David Niblock of DPS would not change his position that the Planning Board would require a variance for building setbacks if it concluded that the existing building is nonconforming. He would agree that DPS is the lead agency for purposes of making that interpretation and analysis of the Zoning Ordinance. He would defer to DPS on the issue. Absent DPS’s position, he would believe a variance would be necessary in this case under Zoning Ordinance §59-G-4.12, if the building was considered nonconforming.

Mr. Janousek further testified that the R-90 Zone applies to this case, rather than the R-60 Zone, because R-90 is the current zone, and Zoning Ordinance §59-B-5.3 applies the current setback standards to a building being altered, renovated or enlarged, which he believes is what is happening here. He asked that Table 1 on page 8 of his most recent staff report (Exhibit 67) be modified to accurately reflect this position. No one objected, and so this was done.

Mr. Janousek indicated that he hadn’t analyzed issues regarding the building line in this case because he deferred to DPS’s conclusion that this was not a nonconforming building.

According to Mr. Janousek, this being a corner lot, there are two front yards with 30 foot setbacks, Walhonding and MacArthur. His recollection is that the front setbacks would be 25 feet if this were an R-60 Zone. Petitioner has the option of choosing the rear and side yards when there are two fronts. The chosen rear yard abuts part of Lot 44, to the southeast. The side yard abuts part of Lot 32 to the northeast.

Mr. Janousek testified that the parking lot here is a parking facility subject to the law governing special exceptions. Ordinarily, it would require a parking facility to be set back the same as the front yard setback (30 feet) in the front. Buffering is also required to help screen light, noise, fumes that may be emitted from the parking lot and might cause disturbance on adjacent property. One of the goals is to try to screen the cars in the residential neighborhood from adjacent abutting properties to the extent feasible, but Mr. Janousek is not aware of any requirement to screen from automobiles driving down adjacent road. That was not considered when evaluating the proposal.

According to Mr. Janousek, MacArthur Boulevard is a Maryland Scenic Highway. His general recollection is that the structures aren't visible on the roadway on either side of the road for a stretch of about a mile. He doesn't know of any specific goal of the Master Plan that spoke to visual screening of cars on MacArthur Boulevard. Mr. Janousek testified that this development is not inconsistent with the goal of the Master Plan to preserve the scenic beauty of the area. It does not remove any significant trees or vegetation. It maintains the hillside. It does not add any additional curb cuts on MacArthur Boulevard. Technical Staff believed the addition of all the landscaping here actually improved the historical resource which is mentioned. It will actually make the site greener and more pleasant.

Across MacArthur boulevard from the subject site is a parking lot "for anybody who wants to stop there." There's no signage which names specific usage. However, in evaluating the case, he considered only the parking on the subject site, and he didn't evaluate the parking lot on the other side of MacArthur Boulevard. It was his understanding that the parking that would be needed for this use would all occur on the subject site, and would include seven spaces, one of which is handicapped. Seven spaces are required by the Zoning Ordinance based on the square footage of office space, and the required handicapped space may be one of them, rather than an additional space. In calculating the appropriate number of spaces, Mr. Janousek looked at both the number of square feet and at how

many people would be working on site and might be visiting the site at any one time. He understood from Applicant that very few times would there be seven employees on the site at one time altogether. Also people can car pool or ride a bike to work. There's lot of different ways to get to work. Not everybody drives a single occupancy vehicle. A regular parking space is 8 1/2 feet wide by 18 feet long. Applicant asked for a waiver as to the size of one space, which is 7 feet wide. This is a small parking lot, but it does have access to paved areas on the edge of the parking lot. You could actually walk out to the sidewalk, so it still meets the objectives of §59-E-4.2. Mr. Janousek did not do a safety analysis. Technical Staff generally does not, and neither does transportation technical staff.

Mr. Janousek further testified that the proposed use is for an architecture firm as the main user. Like any business, you'll contract with other people such as a contractor, or an interior designer, working with their clients. In his opinion, a sole contractor use would not be a professional office. He understood that the purpose of the building is for architects to work in; that there is only a liaison staff member, one person from a contractor firm, which itself is located elsewhere, that would be working in the building.

Mr. Janousek relied on his own analysis of the Master Plan compliance, but he was informed by other technical staff that Community Based Planning staff didn't see any conflict with BCC Master Plan.

4. Dan Hardy, M-NCPPC Transportation Planning Division (11/17/06 Tr. 54-80):

Dan Hardy, an analyst from M-NCPPC Transportation Planning Division, testified that he reviewed the revised site plan in this case, Exhibit 167(a), to examine the revised parking and consider any adverse impacts from the revised parking operation plan. In his opinion, the revised parking plan achieves a number of objectives in terms of layout that are helpful, as described by Mr. Brenneman. He still had three concerns, outlined in Exhibit 141. One was that there needed to be a

parking operation statement because of the degree of change in stacked parking proposed from two spaces to a 2 by 3 arrangement. Also, there should be a signing of the visitor space that had been described as part of the plan and, thirdly, the statement of operations should be amended so that clients will not be scheduled during times when all seven staff members are on site.

Mr. Hardy recommended three additional details in the statement of operations for parking. One was to establish employee parking space priorities, which space should be used first by employees. Second was the establishment of protocols for moving employee autos. He believes that the revised statement of operations does use the keyboard or collection of keys, so that each employee can move other employee's cars. Finally, he recommended a brief description of the parking maneuvers, so that it was clear for the employees how to get cars out of staff operations.

Petitioner's fourth amended statement of operations (Exhibit 145(a)) addresses only the parking management plan, but it adequately addresses his points, except that he wanted a sign on one parking spot indicating that visitors are given the opportunity to park there, and they're not drawn into the straight back employee stacked parking. He agreed that it does not need to be dedicated solely to visitors, and it could be used by an employee when all employees are on site and no visitor is scheduled. The sign could indicate simply visitor parking, with the recognition that that was not to be enforced during the times that the seven employees and no visitor was scheduled on site. With that noted, the revised parking plan portion of the statement of operations satisfies his concerns about parking on the site.

Mr. Hardy further testified that he does not have any knowledge of how the county addresses parking on the parking lot across MacArthur Boulevard from the subject site, but he understands the county operates it, and it is not signed or marked for any particular use. He does not know what its intended purpose is.

Mr. Hardy evaluated the safety of the driveway that connects to Walhonding from the on-site parking facility, and he did not have concerns about it because the situation was improved by the revised parking plan, both in terms of reducing the curviness of the eastern intersection and by maximizing the distance between the driveway apron and the MacArthur Boulevard. In his opinion it's satisfactory from a safety standpoint. He has not done a sight distance study but his assessment is that there is adequate site distance at that location, and vehicles making a turn from MacArthur Boulevard at 30 MPH have to consider the impediments, such as a pedestrian, which might be in their path as they make that turn. Mr. Hardy also does not believe it is unsafe for cars to have to maneuver in the amount of space contained in the site's proposed parking facility. It would not be appropriate for delivery vehicles to use the handicapped space.

Mr. Hardy indicated that it is standard for all residential streets to encourage the use of the landscape strip near the street for planting, but one has to be careful about what is planted there so as not to block the view of drivers emerging from the driveway. The bushes as shown are approximately 3.5 feet tall and are approximately 8 feet from the driveway. In his opinion, if you were backing out of the driveway onto Walhonding and you looked to your right, those bushes at that location at that height would generally not cause you to have a problem seeing oncoming traffic going up Walhonding. Mr. Hardy has not done sight distance calculations on the matter, but based on his site visit, he believes that there is also enough time for a car going up Walhonding to see and take appropriate or safe measures if a car is backing out of the driveway as proposed. The operating concern is how much does a driver slow down to begin to make the turning maneuver in the first place, and there are good lines of sight at that intersection. The posted speed on MacArthur is 30 MPH, and the speed limit on Walhonding is a 25 MPH.

Mr. Hardy could not recall how close the nearest no-parking sign is to the site, but generally, in the vicinity of the store, other than directly across the street, parking is prohibited on MacArthur

Boulevard. He is not aware of any parking restrictions along Walhonding. He felt that parking there is not desirable because Walhonding is a very narrow roadway, but not apparently unsafe enough to be prohibited.

C. Community Witnesses in Support

The following community witnesses testified in support of the petition: Sylvia Reis, President, Mohican Swimming Pool Association (4/10/06 Tr. 123-129; 5/12/06 106-111); Arrigo Mongini, President of the Mohican Hills Citizens Association (properties west of Walhonding, 4/10/06 Tr. 130-137); Marion Ellis (11/4/05 Tr. 52-58); Lori Veirs (11/4/05 Tr. 60-82); Alexander Djordjevich (11/4/05 Tr. 82-94); Robert Hazen (11/4/05 Tr. 94- 109); Joe Saliunas (11/4/05 Tr. 111-121); Candace Charlton (11/4/05 Tr. 121-133); Wayne Goldstein (11/4/05 Tr. 133-142); David Haas (4/10/06 Tr. 112-123); Margaret Hazen (4/10/06 Tr. 138- 142) ; Harry Schwartz (former Director of Public Policy for the National Trust for Historic Preservation – 4/10/06 Tr. 143-150); Philip Thorson (4/10/06 Tr. 150-156); Adrienne Lewis (4/10/06 Tr. 157-160); Leslie Miles (5/12/06 Tr. 13-17).

1. Sylvia Reis, President, Mohican Swimming Pool Association (11/4/05 Tr. 59-60; 4/10/06 Tr. 123-129; 5/12/06 106-111):

During her fist day of testimony (4/10/06 Tr. 123-129), Sylvia Reis testified that she lives at 5136 Wissioming Road in Glen Echo Heights, and has lived there for 38 years. She is the President of the Mohican Swimming Pool Association (MSPA), and testified on behalf of that organization. After recalling her history as a community activist, Ms. Reis indicated that she had attended the elections of the civic association, and there was no discussion of whether they were for or against the Sycamore Store process.

Her organization's interest is what kind of traffic is going to be generated by the proposed use. The children using the pool used to walk on MacArthur Boulevard to the Sycamore Store to buy their candy, and they were competing with lots of traffic. "All kinds of small delivery trucks came to buy sandwiches at the Sycamore Store and there was constant traffic back and forth." The MSPA sees

the Sycamore Store proposal as a much lower traffic volume than what it used to be when the children were going there and all the small businessmen in their trucks were stopping at the Sycamore Store for lunch. Therefore, MSPA favors of the proposal. A single family residence might have even less traffic, but the site was for sale and nobody bought it. Ms. Reis did not know what efforts were made to market it, but she stated that no other property in Glen Echo Heights needed any effort to market it.

Ms. Reis noted that the Sycamore Store, in the 38 years she lived there, has always been a commercial establishment, until the store folded. It was never attractive as a single family residence when it was put up for sale.

Ms. Reis further testified that, during the summer months the pool's parking lot, which holds less than 100 cars, is heavily used and would not be available to anybody else. People coming to the pool would not ordinarily run into any traffic near the subject site. Membership in MSPA is 400 families from an area that's bigger than Glen Echo Heights and Mohican Hills. It is not within walking distance for a number of members.

During her second day of testimony (5/12/06 106-111), Sylvia Reis testified that she was at the meeting of the Glen Echo Heights Citizens Association in February of 2006 during which Leslie Miles and Ms. Reis's husband made a motion, which was amended and seconded. It was voted upon and passed by the huge majority of the people at this meeting, instructing the Civic Association to report back to this hearing that there was no agreement from the community as to the proposed use. The meeting ended, and after the fact, the Association officials decided that it was not a correct motion because Leslie Miles was not a dues-paying member of the Association. Ms. Reis objected to changing the ground rules for "making motions and voting on motions" after the fact. No letter was written by the Association withdrawing their opposition because the officials felt it wasn't necessary.

2. Arrigo Mongini, President of the Mohican Hills Citizens Association (properties west of Walhonding - 11/4/05 Tr. 110-111; 4/10/06 Tr. 130-137):

Arrigo Mongini testified that he lives at 5541 Mohican Road in Bethesda. He is President of the Mohican Hills Citizens Association (MHCA) and he testified on its behalf. MHCA represents about 250 families in properties to the west of Walhonding, or more specifically, properties located from the western edge of Walhonding, west to Wiscasset and north to Massachusetts Avenue. Glen Echo Heights is to the east. Mr. Mongini testified that the Mohican Hills Citizens Association urges the Board of Appeals to grant the special exception for this project

Mr. Mongini testified that his wife grew up with the Sycamore Store and has memories of buying candy there. He noted that the Sycamore Store has long been a landmark in the area. The Mohican Hills Citizens Association voted unanimously at meetings on two separate occasions over the last two and a half years to support the efforts of Brenneman and Pagenstecher to obtain permission to move their architectural office to the Sycamore Store, to restore and adapt the building for this purpose and to have it designated as a historic site. Mr. Mongini testified that he is aware of the efforts and expense Petitioner has made to make certain that the building retains the character and specific design details that have made it a neighborhood landmark, and to shape their parking arrangements and operations so as to minimize any disruption to neighborhood residents. He noted that the site is unsuitable for a modern residence, and were it not for the efforts of Brenneman and Pagenstecher, the Sycamore Store would undoubtedly deteriorate further and ultimately be destroyed. Therefore, this special exception will enable the adaptive reuse of the building bringing its appearance as close as practical to how it looked in the early 20th Century and the days of the Glen Echo Trolley Line.

The Mohican Hills Citizens Association has continued to support this project through all the hearings. To be certain that the community continued to support the project after the formal application had been filed, and more information became available on the conditions of its occupancy (including the parking waiver requests), Mr. Mongini sent an e-mail message to the list of addresses

covering about 75 percent of the neighborhood of 250 families. That message included a copy of the application, which he asked the neighbors to read before answering. The response was 50 to 1 in favor.

Mr. Mongini further testified that MHCA is convinced that the protections afforded by historic designation will ensure that the preservation of the building during its occupancy by the architects and even beyond. The conditions imposed by the zoning text amendment and by the special exception and the public scrutiny to which the project has been subjected in the course of these various public hearings will ensure that the new use of the site will fit comfortably into the neighborhood.

Mr. Mongini indicated that Petitioner made presentations to MHCA, and there was no presentation by any opposition.

3. Marion Ellis (11/4/05 Tr. 52-58):

Marion Ellis testified that she lives in the corner house at 5109 River Hill Road, Bethesda, the location of which was annotated on Exhibit 38. Her home is in Glen Echo Heights, about 3 blocks from the Sycamore Store, and she has been there for 41 years. Ms. Ellis testified that the Sycamore Store has been part of her life and her children's lives all those years, and she has visited it many times. She believes that the proposed use of the Sycamore Store "is far and away the most advantageous use that could be there." Ms. Ellis characterized the alternatives have been bandied around the neighborhood (from Starbucks to restaurants) as "ludicrous."

Ms. Ellis further testified that there was never a vote taken in the Glen Echo Citizen's Association, and that they sent out a very biased poll, with questions such as, "Would you be bothered by bright lights in your house eight hours during the night?" In her experience in the neighborhood, she feels that "almost no one" is opposed to this use. She thinks it's a "high class, classy proposal" and far and away the best of all the alternatives. When asked on cross-examination for her thoughts on using this site as a single family residence, Ms. Ellis replied that she could not

imagine a single family wanting to live there; it's a very impractical place for a home. She would prefer to preserve it as the Sycamore, rather than see it as a home. In her opinion, if the exterior were retained, "you'd have a hard time selling that place as a home."

Ms. Ellis stated that she thought the maximum number of employees was seven, but it would be a rare case that they would all be there at the same time, because as architects, they go out to see their clients, leaving no more than two or three people in the office most times.

4. Lori Veirs (11/4/05 Tr. 60-82):

Lori Veirs testified that she lives at 5214 Wyoming Road, and owns the home, which she rents out, directly above Sycamore Store, at 6540 Walhonding Road. These locations were marked on Exhibit 38. Ms. Veirs and her husband both support Brenneman and Pagenstecher's proposal. Her husband has been a paving contractor for Petitioner, but does not have any financial interest in this project. She stated that his connection with Petitioner does not influence her testimony.

Ms. Veirs indicated that she grew up in Glen Echo Heights, and lived in the home right above Sycamore Store. She "bought penny candy there as a kid, I took ballet lessons there, I sat on the stoop and caught the school bus in front of the Sycamore Store." There's a parking lot in front of the current garage where cars have parked in random fashion for decades. The parking issue is "not a big deal" to her. Historically, there's a pattern of cars parking perpendicular to Walhonding Road, in front of her rental property and other properties on Walhonding, so adding an organized parking lot would be a great addition. She is also satisfied that the parking facility will be shielded and screened from her adjacent rental property.

She feels "it would be a blessing for Brenneman and Pagenstecher to take over this property, be able to save history of Sycamore Store, to redo it in a way that would make it beautiful." She characterized their work as "breathtaking."

Ms. Veirs' other issue is the crumbling retaining wall on their property line adjacent to the subject site. Her house is right above that, on a very steep hill in the back. She is very concerned that if someone were to build any kind of house there, retaining walls would be their lowest priority. Since she is on the hill above the site, she is happy to hear that they're going to be putting a retaining wall in, fixing the hill and adding ground cover.

Ms. Veirs dismissed the idea of using the Sycamore Store as a single family residence, because it would require too much work to make it livable as a residence while keeping the historical building. In her memory, the only time the store was used solely as a residence was after the owners got too old and closed the store, five or ten years ago. The structure is deteriorating, and there is rotted wood on the outside.

5. Alexander Djordjevich (11/4/05 Tr. 82-94):

Alexander Djordjevich testified that he lives at 6232 Walhonding Road, Bethesda, Maryland, about a quarter of a mile north of the Sycamore Store. He and his wife have lived there since 1992, and he marked the location on Exhibit 38. The Sycamore Store, when he first moved in, was not always operational. There were people living there, but it wasn't open all the time. When he first learned that it was for sale, he did not think anybody would buy it as a home, because there's no shielding of the property from MacArthur Boulevard, and it simply was not an attractive place for a home.

Mr. Djordjevich felt that Mr. Brenneman approached the community in a very open manner as to what he wanted to do at that location. He had an open meeting at a church, where he put on a very informative slide presentation on the history of Glen Echo Heights. It's very clear to Mr. Djordjevich that Mr. Brenneman is passionate about the history, he wants to preserve the history. Mr. Djordjevich is concerned that another, less scrupulous design-build firm, or other person who wanted to use it for a commercial use, could put something that was much more objectionable. He also has no objection

to the proposed parking, and there is a parking lot right across the street, on MacArthur Boulevard, where all sorts of people park, so he doesn't see the parking as an issue.

Mr. Djordjevich further testified that the membership of the Glen Echo Heights Citizen's Association is divided on this issue. He ran for president of the Association but lost in a close vote. Although the other slate made it known that they opposed the subject Petition, there were other issues in the election. The new officers of the Glen Echo Heights Citizen's Association put out a survey purportedly to find out what the view was of the community on the Sycamore Store, but he characterized it as “a push-poll,”²⁸ which he described as political campaign technique in which an individual or organization attempts to influence or alter the view of the respondents under the guise of conducting a poll.

Mr. Djordjevich does not believe that the proposed use would change the character of the neighborhood since they are not a retail operation, and there would be no store front. It also doesn't bother him to drive by at night and see a car there or somebody working at their computer. He said that was better than it being vacant, which it has been for several years.

6. Robert Hazen (11/4/05 Tr. 94-109):

Robert Hazen testified that he and his wife live at 7021 MacArthur Boulevard, in Bethesda, Maryland, and have been there about 10 years. His home is adjacent to, and immediately east of, the Sycamore Store. In addition to the Veir's property, which is immediately above, his home is the most contiguous property to the store itself. It overlooks the store, and his driveway exits onto MacArthur Boulevard next to the store. He and his wife strongly support the petition of Brenneman and Pagenstecher.

Mr. Hazen explained that he is extremely grateful to Dean Brenneman for saving this historic structure. He could have torn down the old and decaying building the day he closed on the property,

²⁸ The court reporter erroneously recorded his words as a “push-pull.”

but instead, he has done everything in his power to preserve and protect the store and confer it with historic status.

Mr. Hazen noted that several opponents of the petition have argued that granting this petition will establish a precedent that will change the character of MacArthur Boulevard. In his opinion, such a claim is utterly baseless. The Sycamore Store is the only building of such historic significance in Glen Echo Heights, and is also the only such building along that stretch of MacArthur Boulevard. Furthermore, the store was a commercial structure for many decades, so granting this petition does not open the door for other professional or commercial ventures in the neighborhood, nor does it establish a precedent that could be used to change the character of the community.

Mr. Hazen believes that the survey purportedly representing the views of the Glen Echo Heights Citizen's Association was severely flawed in its design and execution. He argued that the survey is prejudicial in the tone and content of the questions; that it was handed out at a Citizen's Association meeting, side by side with a highly inflammatory questions and answer sheet prepared by the officers of the association; and that the members of the community were not permitted to comment on or to discuss the questionnaire in a public forum. In spite of several requests at the community meeting last month, he was prevented from expressing his views to my neighbors at this public forum, prior to their filling out the questionnaire.

Mr. Hazen stated that he is the homeowner who is arguably the most affected by the Petition of Brenneman and Pagenstecher, and he urged approval of the Petition to preserve the historic Sycamore Store. He believes "this is a wonderful use of this store, and far preferable to any of the proposals that I've heard." One officer of the community said she was going to turn it into a Starbucks; another suggested turning it into a bed and breakfast. It is going to be an incredibly expensive and difficult renovation to preserve the building. The paint is peeling, the wood is rotting, the sign is partly damaged and falling off and the basement has a dirt floor with rotting timbers. The

house was on the market for quite a number of months at a rock bottom price for the neighborhood, but it just sat there in an incredibly hot market. Other houses were coming up and selling in one afternoon with 10 people bidding. Mr. Hazen sees no alternative to Petitioner's proposal that's viable and will still preserve this "wonderful old building."

7. Joe Saliunas (11/4/05 Tr. 111-121):

Joe Saliunas testified that he lives at 6401 Walhonding Road, two houses away from the Sycamore Store, on the opposite side of the street. He stated that his family, which includes two children under the age of 9, are major stakeholders in the fate of the store. Mr. Saliunas is in favor of the special exception proposal by Brenneman and Pagenstecher to establish an office at the location of the store. He feels that the proposal is a creative and viable approach to retaining the historic store and enhancing and retaining the unique character of the neighborhood.

In Mr. Saliunas' opinion, the terms of the special exemption, which includes limits on customer visitation hours, staff use and parking, in his opinion, balance the ability of Brenneman and Pagenstecher to operate a viable small business at that location, in a way that will not adversely impact the neighborhood. Any nominal change will be more than offset by the value of retaining and restoring the historic and fun structure. Mr. Saliunas fears that rejection of the petition will result in abandonment of their project, and possibly, reselling it, or continued deterioration, or demolition of the structure. He believes this is the last opportunity to save the Sycamore Store, and one "can't bet on some hypothetical outcome of a single family home being built there." In his opinion, the introduction of this nonresidential use does not adversely affect the character of the neighborhood; rather, it helps to retain the connection to the historic use as a kind of commercial hub. Mr. Saliunas referenced a book entitled "A Social History of Bethesda," which has stories about people gathering in front of the store. He urged approval of the special exemption, so that his two children, "can grow up in a neighborhood that has a visible connection to its colorful past."

Mr. Saliunas further testifies that the proposed parking arrangement does not bother him. There are several asphalt and gravel parking pads on Walhonding. He also stated that the aerial photographs in Attachment 8B to Exhibit 23 accurately reflect the parking pattern in the area, and that there are some lots in the neighborhood along Tuscarawas Road, where there are sometimes four or five cars routinely parked.

8. Candace Charlton (11/4/05 Tr. 121-133):

Candace Charlton testified that she lives at 5022 Wissioming Road, and has been there for five years. She noted her location on Exhibit 38. She drives by the Sycamore Store every day and observed that it is a dilapidated building, an eyesore in need of serious upkeep. She believed that eventually a developer would buy the Sycamore Store, level it and stretch a huge mansion from one end of the lot to the other, which has happened over and over again to much larger residences in much better shape than the Sycamore Store. She feels that Petitioner's proposal is a good compromise, joining the old with the new, melding history with progress. The structure will be owned by someone with special knowledge and skills required to renovate and upkeep the Sycamore Store, as well as a proclaimed and thus far proven, interest in preserving the character of the neighborhood.

Ms. Charlton further testified that she tried to verify negative statements she had heard about Petitioner, and time and again, "the assumptions behind the statements were proven invalid." It is her belief that some leaders in the community, pledged to represent the citizens of Glen Echo Heights, are instead not only ignoring the desires and opinions of the community, but are actively disseminating false and misleading information. She challenged the initial survey issued by the Glen Echo Heights Citizens Association as biased and misleading, and stated that these leaders do not represent the views and opinions of the whole community.

Ms. Charlton believes that Mr. Brenneman has been honest and forthright in his intentions, and a design-build firm is a good compromise. She concluded that Sycamore Store is an eyesore

badly need of repair, and that this opportunity should be embraced. She fears what will happen if Petitioner is not permitted to renovate the store, and she brought with her a petition signed by 58 of her neighbors who hold similar views (Exhibit 44). Ms. Charlton indicated that nobody connected with Petitioner directly participated in gathering the signatures.

9. Wayne Goldstein (11/4/05 Tr. 133-142):

Wayne Goldstein testified that he lives at 3009 Jennings Road, Kensington, Maryland. Although he does not live in the neighborhood of the subject site, he is President of Montgomery Preservation, Inc., and came to testify as an individual in support of the adaptive reuse of the historic Sycamore Store. Montgomery Preservation, Inc. is a county-wide historic preservation advocacy organization. He is also President of the Montgomery County Civic Federation, which works with organizations throughout the county.

Mr. Goldstein stated that the Sycamore Store has been used for commercial purposes since 1919, and it is this long period of usage that has established it as such an important historic and cultural landmark, though in recent year's it has been used just as a residence. Many people in the community support the historic designation and the adaptive reuse that ensure that the property will always be protected and will be used in a way that is compatible with how it has been used for the last 86 years, rather than as another new mansion that would further change the character of their immediate neighborhoods in undesirable ways.

Mr. Goldstein further testified that he is a member of several land use committees that under other circumstances, might require him to be less supportive of this use, but in this case, given the commercial history of the use, he feels that the proposal would cause no new intrusion on the community. He noted that the parking requirement would be met on site in a way consistent with past use, and which is less environmentally negative by being a pervious gravel instead of the asphalt. The property is well screened from its neighbors by virtue of its elevation, the trees and shrubs

already on the property, and the additional plantings that will be made. The addition of a sidewalk and a handicapped parking space will be make the property more accessible, and the special exception will permit the continued use of this 86-year-old commercial structure in a less intense nonresidential way. Mr. Goldstein urged approval of the special exception.

On cross-examination, Mr. Goldstein testified that under Montgomery County Code §24A-10, if a property has deteriorated and the cost to take care of it exceeds its value, the Historic Preservation Commission could allow such a property to be demolished.

10. David Haas (4/10/06 Tr. 112-123):

David Haas testified that he has lived in the neighborhood of the Sycamore store, at 6220 Walhonding Road, since 1991. He stated that the core issue is whether or not Mr. Brenneman can be trusted to do what he says he'll do, and Mr. Haas believes he can be. He also has "solid references." Mr. Haas has gone to Mr. Brenneman's office several times, and has never seen more than two cars in his parking lot.

Mr. Haas also challenged the notion that the character of the neighborhood is 100 percent residential. According to Mr. Haas, there are three businesses on Walhonding Road, an industrial film distribution company, a photography studio and a construction company, Albert Paving. Albert Paving's business is across the street from Mr. Haas's house, and he has never seen traffic caused by the business. It is his understanding that these businesses are operating because they existed prior to the latest round of zoning, so they were allowed to stay in business.

Mr. Haas also contends that the traffic issue is not a valid question in this case because development outside of the neighborhood will generate far more traffic on neighborhood streets than the addition of seven cars on the subject site. As to parking, he noted that there is a large parking lot across MacArthur Boulevard from the Sycamore Store. He believes that its purpose is to facilitate parking for people who want to go down to Sycamore Island and the C&O Canal. It is heavily used

on weekends, and it holds up to 25 cars. According to Mr. Haas, a lot of people put gravel parking paths in the right-of-way along Walhonding Road so that they can park their additional cars there.

Mr. Haas feels that it is admirable that Dean Brenneman has made an effort to preserve this historic site, and he believes that many of the residents in the neighborhood are ready to see this renovation take place because in its current state, the building is an eye sore and the renovation will be something “we'll be proud of.”

11. Margaret Hazen (4/10/06 Tr. 138- 142):

Margaret Hazen testified that she lives at 7021 MacArthur Boulevard, which is immediately adjacent to the Sycamore Store. Her husband also testified in support. Their house overlooks the store, and their driveway exits onto MacArthur, immediately adjacent to the subject site. They both support the petition .

Mrs. Hazen stated that the Sycamore Store is a unique property, and allowing its renovation will not set a harmful precedent. She noted that she is an historian, and preserving the old Sycamore Store appeals to her. She likes seeing that Sycamore Store sign when she hikes up from the canal, as do a lot of other people. Preservation of the store matters to her.

Mrs. Hazen pointed out that time is passing and the store is deteriorating. There is no feasible alternative on the horizon, and she strongly believes Petitioner should be allowed to go ahead. Mrs. Hazen characterized Petitioner as “good hard working people who are willing to work on a building in a rational and a conservative way . . . , and they seem to be very generous about what they're hoping to do.”

12. Harry Schwartz (4/10/06 Tr. 143-150):

Harry Schwartz testified that he lives at 7011 MacArthur Boulevard and has been there for the last 29 years. He is a close neighbor to the store, being the third house to the east of it. He is also a former director of public policy for the National Trust for Historic Preservation and a member of the

Board of Directors of Preservation Maryland, a statewide non-profit organization whose mission is historic preservation within the State of Maryland. His testimony, however, was on his own behalf.

Mr. Schwartz stated that, as an historic preservationist, what one prays for is someone who brings an adaptive use which works, to a building of historic importance. It is a very hard thing to do, which is why he applauds Mr. Brenneman's plan and is a strong supporter of it.

In the absence of an effective adaptive use, in far too many cases there is "demolition by neglect." An historical building which is not used tends to deteriorate, and that deterioration tends to arrive at a point where demolition of the building is requested and granted. The site then is deprived of that building and is available for another use. In this case, the other use would be residential, and there has been a good deal of "mansionization" within MacArthur Boulevard and the Glen Echo Heights area. Mr. Schwartz testified that it is his concern that either the property would be permitted to deteriorate or be destroyed by other means, and that it would be replaced by an inappropriate, but nevertheless residential building in an extremely prominent spot which for many years has been identified as a store and the portal to the Chesapeake and Ohio National Park and canal.

For these reasons, Mr. Schwartz strongly supports the Brenneman plan.

Mr. Swartz agreed that a goal of historic preservation is to perpetuate the historical or the generalized accepted use of the property. He cited the "Guidelines of the Secretary of the Interior for Rehabilitation," which contains ten points promulgated for historic preservation. One of those points says that a building of historic importance should to the extent possible continue to be used in the way in which it was used when it acquired its historic character. Continuation of use is an essential component of maintaining the historic character of the building. In his opinion, the current proposal does provide this continuation of use as a nonresidential, commercial property. The period of significance is the 1920s, with regard to the structure the building has today. The subject petition is also the only viable alternative presented which would preserve the exterior envelope of the store in

its historic form. Although Mr. Schwartz indicated that he has not done an analysis of this property to determine whether it could be viable as a residence, he stated that there is no other viable option on the table at this time.

13. Philip Thorson (4/10/06 Tr. 150-156):

Philip Thorson testified that he has lived at 7001 MacArthur Boulevard, in A house overlooking Sycamore Store, for 58 years. His house is to the east of Mr. Schwartz's home, but is up much higher, so he has a view of the store.

Mr. Thorson testified that he has loved the Sycamore Store. He got to know the people who owned it when it was a thriving "mom and pop" grocery store because there was no competition nearby. The owners lived over the store and raised their children there as a part of the community.

When they had competition from supermarkets, they had to reduce their business and finally ended up selling candies, soft drinks and sandwiches. When they moved out, he despaired over what was going to happen to that fine old place, but he and the neighbors were very happy to learn of Petitioner's plans to buy and restore it. Mr. Thorson cannot understand the opposition because the authority for this place has been drawn so tightly that it would be very unusual if any other place could make this use a precedent for commercialization. He stated that those who are nearby and can see and can hear what's going on favor the proposal. Mr. Thorson also observed that at every stage of this application, every County official and every member of every Board was unanimously in favor of this project, indicating their feelings that it was in the public interest.

According to Mr. Thorson, the people who are opposed do not live nearby; they live up in the Heights and they come down occasionally. They have gotten control of the citizens association, and have used that to try to advance their interests. They circulated two questionnaires, but never circulated a questionnaire that asked the important question, which would you prefer, the preservation of the premises or whatever else might occur? In Mr. Thorson's view, it is better to have a property

that has some historical significance and is an attractive structure serving as an entrance symbol to Glen Echo Heights, considering the alternative of tearing down everything to build the biggest and highest mansion they can. He also does not see a traffic problem with Petitioner's proposal.

14. Adrienne Lewis (4/10/06 Tr. 157-160):

Adrienne Lewis testified that she lives at 5404 Mohican Road. She is married to a gentleman who has lived in Mohican Hills his entire life. She remembers going over to the Sycamore Store as a child and buying sandwiches. After she married, she saw the store was closing and dwindling down, and she wanted to open an art store and café there, but instead started a family.

Ms. Lewis testified about the renovation of Glen Echo Park, which she said related to the Sycamore Store because along MacArthur Boulevard is the historic corridor, and Sycamore Store being preserved relates to the trolley car down at Glen Echo Park. She also sees other locations restored, along the Boulevard in keeping with what is going on down there. She feels that the town of Glen Echo has maintained its identity and status as a community that is not changing, and you see other physical landmarks, such as the Sycamore Store, that mark the entry into the neighborhoods.

Ms. Lewis supports this plan because there is no other possible solution for the store other than to realize it as a commercial entity. She sees this area as part of the big picture of the face of MacArthur Boulevard and the surrounding communities, and she therefore considers the Sycamore Store just as much property of Mohican Hills as it is of Glen Echo Heights.

15. Leslie Miles (5/12/06 Tr. 13-17):

Leslie Miles testified that she lives at 5402 Tuscarawas Road, in Bethesda, closer than a half mile from the Sycamore Store. She stated that, at the February meeting of the Glen Echo Heights Citizens Association at which at least 50 people were present, the community voted unanimously in favor of her motion to send a letter to the County, advising that the Association was withdrawing its prior letter informing the County of its opposition to the request of zoning waivers. That letter was

never sent. The Board made a determination that she was not a dues-paying member of the Association, and therefore did not have the entitlement to make the motion. In her opinion, had that point been raised at the meeting, someone else would have made the motion, since it was a unanimous vote.

Ms. Miles further testified that, although Mr. Winch felt that the community was deeply divided on the issue, that division was the result of misinformation. In her opinion, the community feels pretty strongly at this point that the Sycamore Store waiver should be granted, as reflected in the vote at the last Glen Echo Heights Citizens Association meeting on Wednesday. She stated that the Board voted 4 to 2 not to send Mr. Winch here to testify further. One of the Board members stated her understanding that Mr. Winch had made statements at the last hearing that represented his own views rather than those of the Association. Ms. Miles is not an officer of the Association, and she explained that, in her view, the Association is not trying to withdraw Mr. Winch's testimony, but they're asking that there be no further testimony from him.

D. Community Witnesses in Opposition

The following community witnesses testified in opposition to the petition: Norma Spiegel , Ronald Nessen and John Juenemann²⁹ ; John Fenton, President, Glen Echo Heights Citizens Association (properties mostly to the east of Walhonding) (5/19/06 Tr. 78-85, 137-150); and Peter Winch, Second Vice President, Glen Echo Heights Citizens Association (11/4/05 Tr. 142-183; 5/12/06 Tr. 91-105).

1. Peter Winch, Second Vice President, Glen Echo Heights Citizens Association (11/4/05 Tr. 142-183; 5/12/06 Tr. 88-105):

On his first day of testimony (11/4/05 Tr. 142-183), Peter Winch testified that he lives at 5305 Wehawken Road, Bethesda, Maryland, and he is testifying on behalf of the Glen Echo Height's Citizen's Association (GEHCA), of which he is the Second Vice President. Mr. Winch stated that he

²⁹ The Court Reporter incorrectly identified Mr. Juenemann as "John Giniman."

is in opposition, as is the Board of the Glen Echo Heights Citizen's Association. He indicated that there is deep division in the community about this petition, but he believes there is consensus of the community, as reflected in the survey (Exhibit 42). Mr. Winch defended the questions in the survey as just setting forth what Petitioner applied for.

According to Mr. Winch, the community consensus is strongly in favor of keeping “this charming store,” and supports its historic designation, but there is no consensus behind Petitioner’s current plan. He and the Board of GEHCA have taken a tour of the property and have spoken directly to Mr. Brenneman. Mr. Winch believes that the nearby intersection is dangerous and that a parking arrangement requiring cars to back out onto the road is also dangerous. He also feels that the parking lot would be visible and not in keeping with the scenic area. He stated that this is supposed to be a professional office, but Petitioner also seeks to have non-professional builders in there. GEHCA would not be opposed to just an architect’s office. According to Mr. Winch, there is a consensus in the neighborhood “that we’d hate to lose this quaint reminder of the old days in our neighborhood. But not at any cost.” He clarified that he was referring to the structure, not the retail operation. Even that consisted mostly of selling sandwiches at lunchtime in the later years of its operation. Maintaining its appearance as a store, including its sign, but using it as a residence, would have support of the community.

Mr. Winch further testified that GEHCA was very concerned about Petitioner’s visitors parking across MacArthur, in the spots that are used by the community and by other visitors, to visit the towpath and the Sycamore Island. He stated that this lot was the neighborhood’s only access to these recreational opportunities, which are some of the big attractions of the neighborhood.

According to Mr. Winch, a lot of survey responders, including people today who are in favor, talked about the commercial intrusion on weekends and late at night. The Sycamore Store has always been a residence; people have always lived here. However, the store itself has been closed as a store

since 1995, and now Petitioner wants to establish offices that are not necessarily even professional offices. Also, by packing in the parking, Petitioner will be disrupting the scenic view. There would be too many people working on this property, essentially creating commercial zoning in a residential neighborhood. The intensity is incompatible with the residential character of the neighborhood.

Mr. Winch further testified that membership for the Mohican Hills Swimming Pool is drawn mainly from Glen Echo Heights and Mohican Hills. To get to the pool, community members typically would bike down Walhonding and then up to the driveway, to get in. There is only one walkway to get from one side of MacArthur to the other, and there's no crosswalk at the site of the store, either for crossing Walhonding or crossing MacArthur. There are also traffic issues. Cars will back up all the way to Mohican Road, and occasionally all the way to Walhonding, waiting at a stop sign that will allow them access to the Clara Barton Parkway. This result in cars from Walhonding waiting to get on MacArthur.

Mr. Winch stated that it was not GEHCA that wrote Exhibit 43, which is a series of questions and answers describing issues surrounding the subject proposal. He also did not read it before it was distributed. Mr. Winch indicated that he understood that the Zoning Text Amendment of the applicable special exception was narrowly crafted to apply to the subject property.

On his second day of testimony (5/12/06 Tr. 88-105), Mr. Winch testified that he lives in Glen Echo Heights and that he had testified earlier on behalf of GEHCA with regard to the survey that organization had taken in the neighborhood. [Messrs. Kline and Klauber objected that the testimony Mr. Winch presented at the November 4, 2005 hearing went beyond the scope of the survey and did include his personal opinions about the subject proposal. Nevertheless, the Hearing Examiner allowed further non-repetitious testimony.]

Mr. Winch noted that he was speaking on this date as an individual, not as a representative of GEHCA because the Association decided to stand on the survey results reflecting that the majority

opposes this application. He challenged Ms. Miles testimony, which was to the effect that GEHCA had decided to withdraw Mr. Winch's testimony. He stated that GEHCA's position is the one stated in the letter of February 16, 2006 to OZAH (Exhibit 59), accompanied by the second survey results (Exhibits 60, 60(a) and 60(b)). This position has not been withdrawn or countermanded. Mr. Winch contends that Ms. Miles has an ongoing dispute with GEHCA because she is running a commercial activity (a bed and breakfast) out of her home, and the community association and other neighbors have succeeded in blocking some of her planned uses of her property.

Mr. Winch further testified that the second survey was composed with the assistance of Mr. Klauber, and Mr. Winch said he was not involved in drafting the second survey or in tabulating it. He states that the survey results show that the citizens of Glen Echo Heights remain opposed to this project. The community is concerned about the commercial use of this property. It is in a residential zone, and it is the main entrance to the community, so it is important what goes on there.

Mr. Winch argues that the HPC did a disservice by not pointing out the extremely limited nature of the commercial activity that took place on this property in the past. There was nobody there on weekends doing commercial work. There was nobody there after dark doing commercial work. The store closed in 1995 for good, but it ceased regular operations in 1985. It was only opened for a day or two after that on an intermittent basis. Since 1985, it has not been opened on a 5-day week basis. Since 1995, it has not been opened at all, but always and continuously from 1985 till the day it was sold to Mr. Brenneman, it was used as a residence. People continued to live there; do their laundry there; cook their meals there; and having a living room there, right up until Mr. Brenneman bought it. It therefore had no commercial impact on the neighborhood, historically. It was a one family dwelling with a part of it used for commercial purposes.

Thus, Mr. Winch challenges HPC's finding that continued commercial activity here is desirable. Speaking personally, he does not think it is desirable at this location. If there must be

commercial activity, it should be limited to uses such as an artisan-potter selling his wares and other things that the existing zoning code contemplates.

2. John Fenton, President, Glen Echo Heights Citizens Association (5/19/06 Tr. 78-85, 137-150):

John Fenton testified that he is the President of Glen Echo Heights Citizens Association (GEHCA). He appeared to insure that his letter of February 16, 2006 (Exhibit 59) and its attachments (Exhibits 60, 60(a) and 60(b)), which contain the survey results, are in the record and explained.

Mr. Fenton stated that there was a vote by the Glen Echo Heights Citizen Association that there would be no testimony from GEHCA at the May 12, 2006 hearing because he could not be there and the Board did not want to send Mr. Winch. However, Mr. Fenton was available on May 19, 2006, and he understands his mandate as permitting him to testify for GEHCA as to the steps taken by GEHCA, and the objective in the second survey.

Glen Echo Heights Citizens Association's position is that it opposes the proposed application. Quite a few people want to preserve the store, but they also want to maintain the residential character of the entrance to the community. The majority oppose all the parking waiver requests. They also do not feel that the construction arm (*i.e.*, a contractor-builder) is a profession.

Mr. Fenton explained that GEHCA's Board did a survey early on in October of 2005; however, quite a few people raised a concern in our meetings that it was biased. With that in mind, GEHCA reached out to Mr. Klauber and developed a new survey based on fact. GEHCA did that because it wanted to have a census that the community, not the Board, developed. GEHCA also held a forum with Mr. Brenneman and Mr. Klauber to express both sides of the issue. The objective of the survey was to allow the community to speak in a fair fashion, with one vote per household.

When asked whether there had been a motion at a GEHCA meeting to take a different position than Mr. Fenton expressed at the hearing, Mr. Fenton testified that there was a motion made in a closed GEHCA meeting by two non-members to write a letter to OZAH withdrawing the first

survey submission. It was decided by GEHCA's Board to redo the survey, which Mr. Fenton said was done in a fair and open fashion.

3. John Juenemann (5/19/06 Tr. 158-195):

John Juenemann testified that he lives at 5108 River Hill Road, Bethesda, Maryland. His house is about an eighth of a mile southeast of the store, on the hill along MacArthur Boulevard. He is a painting contractor, but also does general contracting work, and he has worked on structures designated as a landmark. Mr. Juenemann is familiar with the Petitioner's work, although he has never done business with them.

Mr. Juenemann received a letter from Mr. Brenneman describing his purchase of the Sycamore Store and his intention to move his office into it. He was shocked that Mr. Brenneman would think he could move his offices into the Sycamore Store because this firm is a construction company. Mr. Juenemann explained the difference between an architectural firm and a design-build firm, saying that the latter makes more money because 85% of the profits are generated by the construction and only 15% by the architectural aspect. He can't see how Petitioner qualifies as an architectural firm. In his experience, the architects don't visit the site that much; they are mostly in their offices.

Mr. Juenemann thinks it is unlikely that Petitioner will conduct most of his construction business at the Kensington Office, if it is more convenient to do it from the Sycamore Store. He believes that deals will be made at the office where documents can be laid out. In his own shops and warehouse, every single day, UPS trucks come and people who know you are a contractor come looking for jobs. There will also be a lot of activity from dealing with subcontractors and generally because of the size of the operation. He stated that he lives in a residential R-90 neighborhood, and it is unfair to him to have this much activity in the neighborhood. It would also bother him to see the seven cars parked in this scenic area, and the proposed trees would not screen them. Mr. Juenemann

did not know of any parking restrictions on the lot across MacArthur Boulevard but stated that the lot was expressly put there for people who walk on the canal. In his observation, it was not usually full.

According to Mr. Juenemann, a construction contractor does not have to have a professional education, and there is no code of ethics he is aware of. All you need is a Maryland Home Improvement license, but you could pass that without even having a high school diploma.

Mr. Juenemann challenged Mr. Brenneman's estimate that it would take \$750,000 to \$1,000,000 to renovate Sycamore Store. Mr. Juenemann estimated that it could be done for \$350,000 because much of it is just cosmetic.

Mr. Juenemann proffered a Dun and Bradstreet (D & B) report on Petitioner's business (Exhibit 103), but it was objected to and excluded from evidence.

4. Ronald Nessen (5/19/06 Tr. 196-246; 11/17/06 Tr. 161-179):

On his first day of testimony (5/19/06 Tr. 196-246), Ronald Nessen testified that he lives in the closest house to the Sycamore Store on the west side of Walhonding Road (*i.e.*, across the street from the site), and from all the windows on the south side of his house and from his deck, front lawn and driveway, he looks directly out at the Sycamore Store, where Brenneman and Pagenstecher propose to establish their firm, which he characterized as a "construction and design firm" with a parking lot for seven trucks and cars. He strongly opposes allowing Brenneman and Pagenstecher "to build an office building and parking lot" at this location because it would be totally out of keeping with the quiet residential neighborhood which is now zoned R-90.

Mr. Nessen observed that, on the south side of MacArthur Boulevard (*i.e.*, the Potomac River side), across the road from the Sycamore Store, for a distance of almost two miles, all the way from Brookmont on one side to the Clara Barton Parkway, there are no buildings of any kind. It is totally parkland and it is heavily wooded all the way down to the C&O Canal and to the Potomac River. On the north side of MacArthur, along this stretch of nearly two miles, there are only six or eight other

houses, and all of those houses except for the Sycamore Store are well back from the road, much more than 30 feet, or else they are high above the road and heavily wooded. And the rest of that stretch, except for the Sycamore Store and the six or eight houses in that two mile stretch, the rest of that area is entirely parkland, trees, palisades and beyond that as you go further north, all the way to Massachusetts Avenue and beyond Massachusetts Avenue, it is a 100 percent residential neighborhood. There are no commercial properties in that whole long stretch of MacArthur, and going all the way up to Massachusetts and beyond, there are no commercial properties.

According to Mr. Nessen, on the west side of Walhonding, the available area is too narrow to plant the bushes Mr. Brenneman suggested to shield the office building and parking lot from view, and may have had been declared protected wetlands by the EPA. On the east side of Walhonding, the side behind the Sycamore Store, there are four houses, and they are very far back and very high above the road, 50 feet at the minimum. They are all on heavily wooded lots and are virtually impossible to see from the road. For these houses, there are a total of two driveways and three small pads, each for one or two of the homeowners' cars. Mr. Nessen introduced two photos (Exhibits 104(a) and (b)) to demonstrate that the parking pads in the neighborhood were of a residential appearance unlike Petitioner's proposal.

Mr. Nessen stated that, in this whole neighborhood, only the Sycamore Store stands out. It's a few feet from MacArthur Boulevard and Walhonding Road; it's unshielded by trees on either of those streets; and it's clearly visible from far down MacArthur Boulevard. Mr. Nessen asserted that there is no way to shield the parking facility, and he produced two photographs (Exhibits 104 (c) and (d)) to support this point. In his opinion, the parking lot will ruin the scenic view that one sees in those photos, and at night, the use will stand out because of the lights outside and inside from a business office that's going to run until 9:00 o'clock or later. The proposed use is too intense and would change the nature of the area. It would not be in harmony with the character of the neighborhood,

and it would have a detrimental effect on the use and peaceful enjoyment of his home and the neighborhood.

Mr. Nessen also feels that the proposed use would create traffic problems and dangers. Mr. Nessen also expressed numerous concerns about how the parking facility would function under real operating conditions when employees, visitors and trades-people all try to squeeze in. [Some of his May 19, 2006, testimony with regard to traffic and parking was not summarized because it was superseded by Mr. Nessen's testimony on November 17, 2006, following revisions to the plans for the proposed parking facility.]

Mr. Nessen further testified that the Sycamore Store has not been operated as a store since 1995, 11 years ago. Some have said that the Sycamore Store already has the characteristics of commercial usage because of a phone booth and mailbox shown in some photos, but they were removed many, many years ago. Someone testified that a commercial office building and parking lot at the Sycamore Store are justified because the Mohican Hills Swimming Club is nearby, but Mr. Nessen noted, the swimming club is set several hundred feet back from MacArthur, high above the road and completely shielded from view.

Mr. Nessen disagreed with Mr. Brenneman's testimony (as he recalled it) that some of the residents in the neighborhood routinely park five or more cars in front of their houses, and that there is a large government building with a big iron gate on this stretch of MacArthur. He also challenged Mr. Brenneman's assertion that his business is that of an "architect." Ads for the business, Mr. Brenneman's own business cards and signs they post at their construction sites describe the business as "residential architects and builders." (Exhibits 105,106 and 107).

Mr. Nessen suggested that the obvious choice for an adaptive use is to renovate and restore the Sycamore Store as a lovely residence, like every other house in the rest of the neighborhood. He felt that a survey showed that a majority opposes allowing the proposed use in their neighborhood.

Mr. Nessen observed Petitioner's current office in Kensington and found that it is in a totally commercial zone, surrounded by stores and office buildings. Next to his office is a large outdoor parking lot, and in the basement of his building is another parking lot, which persuaded Mr. Nessen that a contractor's and architect's office and parking facility don't belong in a residential neighborhood, near his house.

When the Hearing Examiner asked Mr. Nessen, what, if any, conditions could be imposed on this proposal which would make it acceptable as fitting appropriately into the community, Mr. Nessen replied, “. . . if you can find a way to put the cars behind the building where I can't see them from my house and where they will not stand out so much when you drive along MacArthur Boulevard . . . that certainly goes a long way to meeting my objection and I think probably the objection of others.” 5/19/06 Tr. 222-223. He indicated that he had said the same thing to Mr. Brenneman, who drew up plans six cars behind the building, in three rows of two cars, but those plans “just disappeared.” He added that “if you have six cars behind the building without a big . . . parking facility on the site it would be a much less intense usage. And I think, you know, the screening would also make it less intensive, would make it stand out less. But parking is really the major problem.”³⁰ 5/19/06 Tr. 223-224.

According to Mr. Nessen, the parking lot across MacArthur Boulevard from the Sycamore Store often fills up, even on weekdays and certainly on weekends.

On his second day of testimony (11/17/06 Tr. 161-179), Ronald Nessen testified that the parking proposed for the Sycamore Store is not at all similar to the parking that was cited for near the Glen Echo Inn. That parking lot is a couple of hundred feet off MacArthur Boulevard, not near a busy corner like MacArthur and Walhonding. Moreover, the store behind the Glen Echo Inn is in a commercial zone, while Sycamore Store is in a residential zone.

³⁰ It should be noted that the location of the parking facility was revised following this testimony, and the arrangement with parking in the rear is in fact the current plan proposed by Petitioner.

Mr. Nessen also expressed concern about enforcement of the special exception transportation management plan incorporated into Petitioner's Statement of Operations. He anticipates that if the special exception is granted, there will be trucks, vans, and all kinds of commercial vehicles and construction equipment parked everywhere at all different angles on the driveway apron, just as he has observed at a place called Bell's Builders.

Mr. Nessen observed that Walhonding Road is a narrow, twisting street, which is poorly maintained, but has a lot of traffic. It's used as a cut-through by people going from Massachusetts Avenue to MacArthur Boulevard, and the other way. In his observation, nobody goes 20 MPH, including himself on a daily basis. He estimates speeds of 30 and 35 MPH for people turning onto Walhonding from MacArthur, and 40 and 50 MPH coming the other way. He also stated that it is not safe for people to park on the east side of Walhonding in the area of the Sycamore Store.

In Mr. Nessen's opinion, allowing "a commercial office building" and all the necessary parking for employees and customers and suppliers on this two mile stretch of MacArthur Boulevard, which is parkland on one side and private homes on the other side would be totally out of keeping with the residential character of the neighborhood.

Mr. Nessen believes that under the new parking arrangement, he will still be able to see at least the last row of parked cars from his house. On cross-examination, Mr. Nessen's property was identified as Lot 33, across Walhonding from the Sycamore Store and up the hill, measuring from the center of his property to the northern (*i.e.*, closest) end of the subject site, a distance of 400 feet. Mr. Nessen responded that he has a clear view out of windows on three floors of his house of the Sycamore Store; that he is the closest house on Walhonding to the Sycamore Store; and the proposed parking facility for the Sycamore Store would face his house.

5. Norma Spiegel (5/19/06 Tr. 246-268):

Norma Spiegel testified that she lives at 5305 Wapakoneta Road, in the Glen Echo Heights region of Bethesda. She has lived in this area, off and on since 1927, but her parents also lived there so she visited several times a week. She moved into her own home in Glen Echo Heights in 1966.

Ms. Spiegel stated that she joined the Glen Echo Heights Citizen's Association (GEHCA) in 1967, and was president of the association from 1985 to 2005. She was also the zoning and land use chairman. Ms. Spiegel was also president of the Potomac Valley League in 1975. The goals of the Potomac Valley League were incorporated into the Master Plan for preserving the Palisade and protecting the scenic rustic environment along the Palisade. The league sought to accomplish this by requesting down-zoning from R-60 to R-90. This down-zoning included only a portion of the geologic Palisade, began at Massachusetts Avenue and Goldsborough Road and continuing to Brookmont and Sangamore Road.

Ms. Spiegel further testified that the Sycamore Store is located in the area of the Potomac Palisades that was a concern of the Potomac Valley League. Ms. Spiegel stated that the store, the lot around it and MacArthur Boulevard were carved out of the face of the Palisade in the vicinity of Sycamore Store, from Glen Echo to the Clara Barton Parkway entrance/exit, going southeast along MacArthur. For over one and a quarter miles there were no structures on the river side of MacArthur. It is essentially all national park service property.

On the Palisades side of MacArthur, with the exception of the Sycamore Store, there are no buildings at the store's elevation. There is one residence just east of the Clara Barton entrance that you can slightly see through the trees, but it's higher. All other residences are much higher on the Palisades and out of the line of sight for those driving along MacArthur. The height of the Palisade, along with the setback required, results in an uninterrupted green sheath. One driving along is conscious only of the green envelope until approximately two to three hundred yards beyond the Sycamore Store. This is the only such opportunity in the nine mile distance to Great Falls. It is a

much greater view than one experiences from the Clara Barton Parkway. This is the jewel in the crown that the Potomac Valley League and the Glen Echo Heights Citizens Association have achieved in preserving for all. The Corp of Engineers planned an overlook with parking at the junction with Walhonding Road, but only the parking has been implemented.

According to Ms. Spiegel, the Sycamore Store has existed in some form since about 1916, but 1919 is quoted more often. It is very noticeable at the junction of Walhonding Road because the grade of Walhonding, MacArthur and the building are all the same. She feels it is a handsome building, but very prominent and contrary to the setting. It is visible from a great distance to the west. In her opinion, the use of this structure via the special exception would exacerbate the incompatible nature of the business by having a conspicuous parking lot for seven cars, and “the seven cars cancels the historic value.” There would also be intense activity at the building in terms of employees, visitors and deliveries, as well as the three panel vans which have been acknowledged, and the company's pickups. Further, the activity would take place for an extensive number of hours during the week, as well as several evenings. The place would be lit up in the interior, as offices are during the evening, and the offices will be open on Saturdays and Sundays for employees. The store's famous sign will also be lit daily.

Ms. Spiegel observed that the Master Plan (at page 64) recommends preservation of the Potomac Palisade unique environmental features of steeply wooded slopes and vistas and the perpetuation of an open space character established in the area. The scenic Palisades is one of the few areas in Montgomery County with a combination of delicate, irreplaceable environmental features of wooded bluff, river and cliffs. The steep slopes of the Palisades are an intricate part of this character since they form the scenic vistas and overlooks of the Potomac River. Their preservation in an undisturbed state is essential to minimize erosion and stream degradation. Due to these lovely and unspoiled characteristics, it is of great importance to protect this area through a

variety of measures, the first of which was to down-zone the area from Massachusetts Avenue to the Potomac River and west of Sangamore Road to Goldsborough from the current R-60 to R-90.

Ms. Spiegel then cited Page 70 of the Master Plan, stating that it recommends designating MacArthur Boulevard, from the District line to the intersection with Falls Road in the Potomac subregion, as a State of Maryland scenic route. As a means of further preserving the green quality of the Palisades, there should be no additional curb cuts along MacArthur Boulevard.

Ms. Spiegel quoted page 31 of the Master Plan comments regarding special exceptions.

Of particular concern are office uses which should be discouraged and are better located in areas with commercial zoning such as the Bethesda CBD. It is also important to minimize uses that might degrade the safety and capacity of the highway by creating too many access points and conflicting turning movements.

Based on these provisions, Ms. Spiegel opined that the proposed special exception is inconsistent with the terms and objectives of the Bethesda-Chevy Chase Master Plan. She admitted on cross-examination that, within the Palisades planning area, there are commercial properties fronting on MacArthur Boulevard, but she asserted that they were grandfathered, and therefore nothing can be done about them. She characterized this special exception procedure as the equivalent of “spot zoning” because it is supposed to be an R-90 Zone, but the use on the site in this little lot will forever be a commercial office building, a commercial office use.

Ms. Spiegel testified that she opposes “the whole total package” as inconsistent with this stretch of MacArthur, especially where there's nothing on the river side, and all the homes on the palisades side are invisible.

E. People's Counsel

Martin Klauber, the People's Counsel, spoke in support of the Petition (5/19/06 Tr. 317-322): Mr. Klauber stated that this case must be framed with regard to the public interest and historic preservation. He quoted Maryland Historical Trust documents (Exhibit 90, Section 8) to the effect that the Sycamore Store derives its architectural and commercial significance “from being a fairly rare

building type, that of a bungalow adopted to serve as a neighborhood grocery in the early 20th Century as well as from its location association with early commercial development in the area.” Secondly, “From its inception up to the present day, the history of the Sycamore Store has been closely entwined with that of the Sycamore Island Club.” Topographically, Mr. Klauber asserted, the site and the store have nothing whatever to do with Glen Echo Heights, a neighborhood physically located at a different elevation. The Sycamore Store is physically nestled on the flat area of MacArthur Boulevard, which has nothing to do with the Glen Echo Heights residential area, and never did.

In Mr. Klauber’s evaluation, the Sycamore Store exists because of its “linear orientation” along MacArthur Boulevard. It was built there for a specific function, and it was a trolley stop. There’s a link along MacArthur Boulevard with other features, such as the Glen Echo Amusement Park. Mr. Klauber noted that there is no proposal in front of us for a two-lawyer professional office. We have this application. The testimony from the historic preservation staff praised adaptive reuse and noted that the most prominent facade of the building is along MacArthur Boulevard. It has been deteriorating, and this is a proposal for an adaptive reuse that is going to bring this structure back and preserve an historic landmark designated by the County Council and the Maryland National Capital Park and Planning Commission. If it would take the removal of the sycamore tree to satisfy some of the basic issues that the opposition has and to allow this adaptive reuse to go forward, Mr. Klauber argued that it was an important enough resource to all of Montgomery County that this tree be sacrificed. The Sycamore Store is a County resource, and every day more people go by and see this structure than do the residents of Glen Echo Heights. When you go by this store heading toward Glen Echo, it is a marker.

Mr. Klauber concluded that the public interest is greater than the single community of Glen Echo Heights, and he recommended that the special exception be granted in the public interest and for historic preservation.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The Zoning Ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a non-resident architect’s office. Characteristics of the

proposed non-resident, architect's office use that are consistent with the "necessarily associated" characteristics of non-resident architect's office uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with non-resident architect's office uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a non-resident architect's office include "the building, vehicle activity and lighting associated with the parking, traffic and movement of people and goods also associated with the proposed office." Exhibit 23, p. 11. The Hearing Examiner agrees with Technical Staff's description of the inherent characteristics of a non-resident architect's office, but cannot agree with Staff's conclusion that there are no non-inherent adverse effects arising from the subject use.

This is not an ordinary architect's office, and this is not an ordinary location. The proposal to house an "architect-build" firm, as distinguished from an architectural firm, must be considered a non-inherent operational characteristic of the use. Similarly, the site location in an historic landmark is clearly atypical and must be considered a non-inherent characteristic of the site. Both of these can have adverse effects on the neighborhood. An architect-build firm, if not properly limited, could produce an undesirable amount of commercial activity for a residential neighborhood. Likewise, a site that is being formally preserved for commercial activity as an "adaptive reuse" because of its history as a store, could bring an unwanted level of commercial activity to the area.

Nevertheless, the Hearing Examiner finds that the commercial activity can be appropriately controlled by conditions so as to not have an adverse effect on the surrounding residential neighborhood. The Sycamore Store will be restored from its current state as an unoccupied and

dilapidating building to an attractive historic landmark. The building will not be expanded from its current footprint. Vehicles will be mostly parked to the rear of the building, lighting will be residential in character and traffic production will be quite low.

In view of this evidence and the entire record in this case, and considering size, scale, scope, light, noise, traffic and the environment, the Hearing Examiner concludes that the non-inherent characteristics of the proposed use and site will not create adverse effects sufficient to warrant denial of the petition.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports (Exhibits 23 and 67), the other exhibits and the testimony of the witnesses, including various government officials, provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A nonresidential professional office use is a permissible special exception, pursuant to Code § 59-C-1.31, if “classified in the R-90 zone and designated as historic in the Master Plan for Historic Preservation,” which is the case here.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.38 for a nonresident's professional office use, as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property is located within the area covered by the *Bethesda/Chevy Chase Master Plan*, which was approved and adopted in April 1990. It is also listed in the *Master Plan for Historic Preservation*. For the reasons stated in Part II. B. of this report, the Hearing Examiner finds that the planned use is consistent with the applicable Master Plans.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The general and surrounding neighborhood is predominantly residential in character, with R-90 zoning. Although the proposed use will be commercial in nature, it will be in harmony with the general character of the neighborhood because it will repair and restore an existing residential-style structure, without adding to its size and bulk; it will not generate any significant change in traffic conditions; its parking will be largely hidden from view behind the Sycamore Store; it will be a commercial use of a property which had been used for commercial purposes for many years and is

historically designated to ensure that continued use; and the level of on-site activity will be strictly governed by recommended conditions.

The Petitioner expects approximately two visits per week from clients, and only occasional visits from non-office staff. Petitioner will arrange alternative, off-site parking for weekly staff meetings, if the on-site lot cannot accommodate the additional cars. As observed by Technical Staff (Exhibit 23, p. 14), these short visits by non-office employees and clients will not create adverse impacts. The location, which is adjacent to a major arterial roadway, will allow employees and patrons of the office to come and go without disrupting the general neighborhood. The site will be well landscaped, with vegetation screening the building and parking, and topography will reduce impacts from light and noise onto adjoining properties.

For these reasons, as more fully discussed in Parts II. C. and D. of this report, the Hearing Examiner finds that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site for all the reasons set forth in response to the previous section (59-G-1.21(a)(4)).

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The proposed primary use will be limited to the indoors, so it should not create objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical

activity at the subject site. Parking on the site will be located mostly behind the main structure. Because of topography and vegetation, the use will not be readily visible from adjoining properties. Technical Staff found that the proposed lighting will not create an adverse impact on the general neighborhood area, as discussed in Part II.C.5. of this report. Physical activity will be limited by recommended conditions. Based on the evidence of record, the Hearing Examiner concludes that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff noted that there are no other approved special exceptions in the general neighborhood (Exhibit 23, p. 13). Thus, the Hearing examiner concludes that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely. Although the proposed use will be commercial, the site had been used for many years as a commercial use, and the use will be housed in a residentially styled structure. It therefore will not alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Petitioner's land use expert testified that there were adequate public facilities serving the office in question. Technical Staff also found, and the Hearing Examiner agrees, that the subject property is served by the specified public services and facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review,³¹ as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review ("LATR"). Transportation planning staff reviewed the proposed operations and determined that weekday, peak hour trips will not exceed 30, thereby eliminating the need for a traffic study under Local Area Transportation Review (LATR). Nevertheless, Petitioner's traffic engineering expert did a full traffic

³¹ Policy Area Transportation Review (PATR) was eliminated in the 2003-2005 Annual Growth Policy-Policy Element, and therefore is inapplicable.

study of the intersection of MacArthur Boulevard and Walhonding Road. The results of his study are discussed at length in Part II.C.6. of this report. For the reasons stated therein, the Hearing Examiner, finds, as did Technical Staff, that the use will be served by adequate public facilities and will not adversely affect nearby roadway conditions or pedestrian facilities.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Safety of the proposed on-site parking facility was evaluated by Technical Staff and extensively analyzed by Petitioner's traffic engineer. For the reasons discussed in Part II.C.3. of this report, the Hearing Examiner finds that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff Reports (Exhibits 23 and 67), provide sufficient evidence that the specific standards required by Section 59-G-2.38 are satisfied in this case, as described below.

Sec. 59-G-2.38 Offices, professional, nonresidential

An existing single-family structure may be used for professional office purposes by any member or members of a recognized profession, such as a doctor, lawyer, architect, accountant, engineer, veterinarian, but not including the following:

- (a) *a medical, dental or veterinarian clinic*
- (b) *an in-patient treatment facility*
- (c) *a general business office, such as an insurance company office, a trade association, a manufacturing company, an investment company, a bank or a real estate company.*

Conclusion: An architect's office is expressly permitted under this section; however, the proposed use as an "architect-build" office is a hybrid not explicitly covered by the Zoning Ordinance. As discussed at length in Part II. E. of this report, the Hearing Examiner concludes that such an office can qualify if its activity is limited by appropriate conditions so that it functions as an architect's office and not a builder's office. Such conditions are recommended in Part V of this report. The fact that the majority of the firm is owned by Mr. Pagenstecher, who is a builder rather than an architect, is not dispositive since our concern is the nature of the use performed at the location, not who owns the business.

The property must be:

- c) Located in a central business district that is designated as being suitable for the transit station-residential (TS-R) zone on an approved and adopted sector plan;*
- d) Designated as being suitable for nonresidential professional offices in the R-60 zone on an approved and adopted master or sector plan and is located along a major highway with an existing right-of-way width of no less than 90 feet or along a portion of an arterial road designated as a boundary of a central business district; or*
- (c) located in the R-90 zone and:*
 - (1) designated as historic in the Master Plan for Historic Preservation;*
 - (2) located along a highway with an existing right-of-way of at least 120 feet; and*
 - (3) contain a structure formerly used for nonresidential purposes.*

Conclusion: The property is not located in a central business district or in the R-60 Zone, so it does not meet either criterion "a" or criterion "b." However, it does meet criterion "c" because it is designated an historic site by the Master Plan for Historic Preservation; it is located along a highway with at least a 120 foot right-of-way; and it contains a structure formerly used for nonresidential purposes. The only issue in this regard was

whether MacArthur Boulevard qualified as a “highway” as specified in subsection (c)(2). For all the reasons discussed in Part II. E.1. of this report, the Hearing Examiner finds that it does so qualify.

The Board must find that the property:

- (a) *will not constitute a nuisance because of traffic or physical activity;*
- (b) *will not affect adversely the use and development of adjacent property;*
- (c) *will have at least 25 percent of the lot area devoted to green area.*

Conclusion: The use will not constitute a traffic nuisance because activity will be almost entirely by appointment and will be of a low intensity. The use will occur primarily indoors and will not contribute noise or undue visual intrusion to the community. The Hearing Examiner finds that the proposed use will not constitute a nuisance or affect adversely the use and development of adjacent properties, for the reasons discussed in connection with the General Conditions, in Part IV.B. of this report. The revised site plan (Exhibit 167(a)) indicates that the site will have about 48% green area. Technical Staff reported 41.5% green area (Exhibit 67, p. 8.), but that estimate pre-dated the revised site plan. In either case, the green area will exceed the 25% requirement.

The Board may allow for other than a building designated as historic in the Master Plan of Historic Preservation, the exterior of the premises to be changed, altered or modified provided the single-family character and the basic residential appearance of the building are retained. A historic area work permit must be obtained before any work may be done to alter the exterior features of an historic structure.

Conclusion: The first sentence of this section is inapplicable because the building has been designated as an historic site. A condition requiring an historic area work permit is recommended in Part V of this report.

D. Additional Applicable Standards

59-G-1.23. General development standards.

- (a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: According to Technical Staff, the application meets almost all the current dimensional standards for the use, including lot area, building coverage, green area, building height, and the number of parking spaces. It does not meet the current front yard setback standards for the building because the setback from the MacArthur Boulevard right-of-way is 1.9 feet, and the setback from the Walhonding Road right-of-way is 1.2 feet. Nevertheless, for all the reasons set forth in Part II. E. 2 of this report, the Hearing Examiner concludes that Petitioner is not required to meet the current standards of the R-90 Zone for front-yard setbacks, and that a special exception may be granted with the existing front-yard setbacks. Except for the front-yard setbacks, Petitioner's revised plans meet the applicable development standards, which are taken, in part from the 1950 Zoning Ordinance, and in part from the current Zoning Ordinance, pursuant to Zoning Ordinance §59-B-5.3.

The 1950 Zoning Ordinance was the one in effect when the lot was recorded in its present state in 1953. Under §59-B-5.3, it therefore determines minimum lot size and lot width. The same section applies the current R-90 standards to building height and coverage. Under the Hearing Examiner's analysis in Part II.E.2. of this report, the present front yard setbacks, which do not comply with any Zoning Ordinance, are permitted in the unusual circumstances of this case (*i.e.*, historical designation).

The following matrix compares the development standards at the subject site with those prescribed in the 1950 and current Zoning Ordinances:

Comparison of Development Standards for Case No. S-2651

Development Standard	1950 "A" Lot Standards	Current R-90 Standards	Subject Lot
LOT Minimum Lot Area Minimum Lot Width	5,000 sq. ft. 50 feet at front building line (No Standard at street line)	9,000 sq. ft. 75 feet at front building line 25 feet at street line	6,873 sq. ft. 67.9 feet
BUILDING ³² Front Yard Setbacks Mac Arthur Blvd. (Street) Walhonding Rd. (Street) Side Yard Setback- Rear Yard Setback- Maximum Building Height Maximum Building Coverage	25 25 7 20 foot min. average 15 foot min. at any point 40 feet (No standard)	30 30 8 on a side 25 foot sum of both 25 35 feet 30%	1.9 feet 1.2 feet. 18 feet (no second side) 26 feet 22.75 ft. 19.7%
Green Area § 59-G-2.38	25%		48%
Parking § 59-E-3.7 2.5 spaces per 1,000 square feet of office space	7 spaces for 2,802 square feet		8 spaces (including 1 handicapped and 1 visitor space)

(b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: For a nonresidential, professional office, Zoning Ordinance §59-E-3.7 requires 2.5 parking spaces for each 1,000 square feet of gross floor area, excluding storage area,

³² Footnote 7 to this table in the current Zoning Ordinance provides "The minimum lot width at the building line and yard requirements for a main building or an accessory building or structure may be reduced when the lot is located in an historic district in accordance with the provisions of Sec. 59-A-6.23."

and the attic and cellar areas of the building if not occupied by a professional. Since the gross floor area, as defined in the Code, is 2,802 square feet, seven parking spaces are required. Eight will be provided.

(c) *Minimum frontage* * * *

Conclusion: Not applicable to this special exception.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable; however, a Tree Save Plan will be required.

(e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, the large Sycamore Store sign is designated as part of the historical landmark, and Petitioner will restore it. Under Code §59-F-9.1(a), the additional two square-foot office sign proposed by Petitioner requires a permit because it will be permanently posted in a residential zone and does not meet any of the exceptions listed in Code §59-F-8. A condition is therefore recommended requiring a permit prior to posting of the sign. It is also recommended that the sign not refer to the construction contractor part of Petitioner's business.

- (g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: By designating this structure as an historic site, the Council implicitly found that it is well related to the surrounding area. Petitioner will renovate the building and bring it up to Code, but will not enlarge the structure or modify its historic architecture.

- (h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The lighting will be residential in character and will not exceed the 0.1 footcandle limit along the side and rear lot lines, as shown in the revised Lighting Plan and Photometric Study, Exhibit 127(d).

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: As mentioned above, the proposed exterior alterations are solely to maintain the historic architecture and to preserve the building.

Based on the testimony and evidence of record, I conclude that the nonresidential professional office use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition, as well as the requested parking regulation waivers, should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2651, seeking a special exception for a non-resident professional (architect's) office use, located at 7025 MacArthur Boulevard, Bethesda, Maryland, and waivers, pursuant to Zoning Ordinance §59-E-4.5, of parking regulations contained in Zoning Ordinance Sections 59-E-2.83(b), 59-E-2.83(c), 59-E-2.43 and 59-E-2.21, be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Petitioner shall limit parking spaces on site to eight, and these spaces must be screened as shown on the revised Landscape Plan (Exhibit 127(b)). Parking on the site shall be conducted in accordance with the Consolidated Statement of Operations (Exhibit 166).
3. Petitioner shall limit the use to seven (7) employees stationed on the subject site.
4. Primary hours of business operation shall be from 7:00 a.m. to 5:30 p.m. daily, Monday through Friday. Extended Visitor hours until 7:00 p.m., Tuesday and Thursday evenings.

Visitor and Staff Flex hours are permitted as noted below:

- a. Visitors
 - i. No clients or other visitors allowed on weekends, or at any other time outside of Primary and Extended Visitor hours.
 - ii. Client visits limited to five (5) per week. Client visits to be logged and reserved for DPS inspection purposes.
 - iii. No company trucks or vans allowed visiting outside of the primary business hours (7:00 a.m. to 5:30 p.m. daily).
 - iv. No construction materials allowed to be delivered, received or stored at any time.

- b. Staff Flex hours
 - i. Two (2) staff members, maximum, present between the hours of 5:30 a.m. to 7:00 a.m., Monday through Friday.
 - ii. Four (4) staff members, maximum, present between the hours of 5:30 p.m. to 7:00 p.m., Monday through Friday.
 - iii. Two (2) staff members, maximum, present between the hours of 7:00 p.m. to 9:00 p.m., Monday through Friday.
 - iv. Two (2) staff members, maximum, present between the hours of 10:00 a.m. to 4:00 p.m., Saturday and Sunday.
 - v. No staff members allowed at any other time outside of Primary and Flex Staff hours.
- 5. Parking area landscape screening must be maintained. Hedges located along Walhonding Road must be maintained at a height of 3 feet to 3½ feet to avoid interference with the line of sight of motorists exiting the site's driveway. In the event that landscape screening is removed from an adjacent property, that when in place effectively screened the petitioner's parking area, screening must be replaced on the petitioner's property by modification to the approved special exception.
- 6. Because the subject site has been designated in the Master Plan for Historic Preservation, approval of the Historic Preservation Commission and issuance of an Historic Area Work Permit must be obtained before any exterior changes to the site may be made.
- 7. Petitioner must prepare a Tree Save Plan and submit it to M-NCPPC Environmental Planning staff prior to issuance of sediment and erosion control permits. This plan must be prepared by an ISA certified arborist and demonstrate full compliance with the requirements of Forest Conservation Law Section 22A-12. The Plan shall make every effort to preserve two-thirds of the critical root zone of the 36" caliper Sycamore tree.
- 8. Petitioner shall limit the site's office, professional nonresidential, floor space, as defined in Zoning Ordinance §59-E-3.7, to 2,802 square feet. Petitioner shall provide 8 parking spaces on site, including 1 handicapped accessible space, with appropriate signage, and 1 visitor-priority space, with a sign so designating.

9. If there is any event which would require parking in excess of that provided in the on-site facility, Petitioner shall make a specific arrangement to handle it as provided in the Parking Management Plan contained in the Consolidated Statement of Operations.
10. Petitioner is prohibited from using the public parking lot on the west side of MacArthur Boulevard, directly across from the Sycamore Store, for employees or construction contractors at any time and for visitors on weekends. It may be used for occasional weekday visitors, as long as the County chooses not to post signs prohibiting the lot's use in this fashion. "Occasional" for this purpose means no more than one or two cars, once or twice a week. Abuse of this restriction would be grounds for the Board modifying this condition or revoking the special exception.
11. Petitioner is prohibited from bringing construction equipment and heavy trucks into the on-site parking facility or on Walhonding Road or in the public lot across MacArthur Boulevard at any time once Petitioner's office is operational; however, such equipment may be brought on site to complete the renovation of the Sycamore Store and the site.
12. The non-architectural part of Petitioner's firm (*i.e.*, the building contractor business) may not operate out of the Sycamore store. Peter Pagenstecher or his successor may have an office in the Sycamore Store solely to conduct his overall management role for the firm, but he may not conduct his building contractor business there. The administrative employees of the firm may conduct their activities, which are ancillary to that which would be expected in an architectural office, at the Sycamore Store, even though those activities may be interwoven with some administration of the builder function.
13. Petitioner may repair the existing Sycamore Store sign and may post a sign identifying the professional office after it obtains a permit therefor pursuant to Code §59-F-9.1(a). The office sign should not exceed two square feet, and a copy of the permit should be filed with the

Board of Appeals. Consistent with Condition 12, the sign should not identify the firm as a “builder,” “construction contractor,” or the like.³³

14. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: May 7, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner

³³ Petitioner has previously posted signs identifying itself as “Brenneman and Pagenstecher, Residential Architects & Builders.” See Exhibit 107. Any sign posted on the subject site should not contain any reference to “Builders.”